Supreme Court, U.S.
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No. 97-

In The

# Supreme Court of the United States

**October Term - 1997**

BRYAN LEE LINDGREN - *Petitioner,*

v.

RICKY DALE ANDERSON - *Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

BRYAN LEE LINDGREN
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October 20, 1997

91pp

**I.** **Does any Judicial Officer or Panel have the authority to "knowingly condone" Perjury by a Plaintiff ?**

**II.** **Does any Judicial Officer or Panel have the authority to make an affirmative conclusion based upon a void record or a claim not pled ?**

**III.** **Congress has not defined "Voluntary Transfer", therefore, is it appropriate to expand the definition beyond the plain language of the statue or existing case law ?**

**IV.** **Is it appropriate, in a case of "First Impression", a "Private Action", under the Washington Consumer Protection Act, to require an Investor, to provide a duty, to give legal advice regarding Bankruptcy, meanwhile ignoring the pervasive influence of another party ?**

**V.** **Does any Judicial Officer or Panel, have the authority to award attorney fees under the WCPA, when such fees are not segregated and the fees requested are based upon a fraudulent affidavit ?**

## PARTIES TO THE ACTION

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# PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The Opinion Letter of the Bankruptcy Court was rendered on August 8, 1994. See Appendix A. The Order Re: Bankruptcy Appeal of the District Court was rendered on July 10, 1995. See Appendix B. The Order Re: Punitive Damages And Attorney Fees of the District Court was rendered on January 25, 1996. See Appendix C. The Memorandum of the Ninth Circuit was rendered on May 27, 1997. See Appendix D. The Order denying a request for rehearing and suggestion for rehearing En Banc of the Ninth Circuit was rendered on July 23, 1997. See Appendix E.

## JURISDICTION

To be reviewed, the Bankruptcy Opinion Letter filed August 8, 1994, District Court Order filed July 10, 1995 and District Court Order filed January 25, 1996.

This petition was filed within ninety (90) days of the Order denying request for rehearing and suggestion for rehearing En Banc., which was timely filed and said Order was rendered on July 23, 1997

Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. sections 1254 (1), 1651 and 2106, and Article III of the Constitution of the United States.

## STATUARY PROVISIONS INVOLVED

**U.S. Bankruptcy Code** - 11 U.S.C. section 522 (g) and (h).

**State of Washington** - RCW 19.86.010. 19.86.020, 19.86.910 and 19.86.920 See Appendix F

## STATEMENT OF THE CASE

This case was brought on a right from the Bankruptcy Court and to the U.S. Court of Appeals for the Ninth Circuit.

ANDERSON, an experienced litigator, while in Bankruptcy, doesn't make rent payments for 8 months and is arrested for stealing money from the D.A.R.E. Program.

ANDERSON'S original Complaint for Avoidance of Fraudulent Transfer (Adv. Proc. CR 1) seeks to avoid the transfer pursuant to 11 U.S.C. 522 (h) and also alleges:

Washington Fraudulent Transfer Act
Washington Consumer Protection Act
Washington Common Law Fraud
Tort for Business Conspiracy

Donald G. Anderson, husband of RICKY DALE ANDERSON is joined as a Defendant and ANDERSON files an Amended Complaint for Avoidance of Fraudulent Transfer. (Adv. Proc. CR 73).

LINDGREN is an ex-offender, having pled to one (1) count of unlawful use of a Social Security number in the application of a Montana Driver's License. LINDGREN kept the U.S. Parole Commission fully informed as to this action. On August 11, 1995, the U.S. Parole Commission issued a Certificate of Early Termination.

LINDGREN offered to settle this case prior to trial, by deeding the house back to ANDERSON, which was rejected. (Exh. "B", CS-95-0l8-JLQ, CR 32, Pg. 78)

James P. O'Connor, trial co-counsel for ANDERSON, sued Spokane Legal Services Center (SLSC) for wrongful termination, specifically, because of this case and ANDERSON'S attorney states:

> "James Bamberger opposed settlement of the matter for reasons unrelated to the merits of the case or the client's interests" and "Mr. Bamberger indicated that the interests of SLSC also had to be considered in deciding whether to

recommend settlement to a particular client."

Complaint For Wrongful Termination, Superior Court No. 95-2038322. (Exh. "A", CS-95-018-JLQ, CR 32, Pg. 46)

TODD and her company, HOMESTEAD USA OF SPOKANE, INC. were dismissed from all complaints. TODD is a Licensed Realtor and there never was a legitimate Cause of Action, but she was brought in to extort E&O Insurance money from her and her company.

Donald G. Anderson, husband of RICKY DALE ANDERSON, inherited the property at issue from his father, as his sole and separate property. (Exh. 161) The property consisted of the house on two (2) lots at 1428 W. Grace and small garages on two (2) lots at 1424 W. Grace, which were later demolished to provide one (1) building site.

Because ANDERSON was a party in the protracted litigation involving Guardianship of Henry G. Anderson and later a party in the protracted litigation of the Estate of Henry G. Anderson, which the property at issue was a part. (Adv. Proc. CR 19) ANDERSON was required to pay certain attorneys and expenses to obtain the property from the Estate. (Exh. 169) (RT at 396-398)

On January 17, 1991, ANDERSON received a community interest in the property at issue and simultaneously mortgaged the property to pay attorneys and expenses. CLS Mortgage provided ANDERSON the money at eighteen per cent (18%) interest. (Exh. 168) ANDERSON signed the documents on her behalf and used a Special Power Of Attorney to sign for Donald G. Anderson. (Exh.166) (RT at 404)

Upon completion of this transaction and having paid the attorneys and expenses. ANDERSON received "$ 6,635.27 Amount given to you directly." (Exh.173) Having received $6, 635.27 in January, ANDERSON is unable to account for any expenditures but she did miss the March payment and was late with every payment subsequently, (RT at 400-401)

which ultimately led to the Notice of Default on January 20, 1992, (Exh. 178) and Notice of Trustee's Sale on March 31, 1992, with a balance due of $ 19,214.96. (Exh.180)

On April 16,1992, LINDGREN mailed a letter to Mr. Anderson as follows:

"Mr. Anderson:

Please give me a call if I can help with:

Buying
Selling
Lending

on your Home.

Sincerely, B" (Exh. 181)

On April 20, 1992, ANDERSON showed up, without calling, "I went up to 1608 West Eight." (RT at 284), which was TODD'S condo. ANDERSON briefly explained her problem, "No longer than ten minutes." (RT at 285) and LINDGREN briefly outlined the only options he could assist with. TODD introduced herself as a Realtor. "She gave me her business card" (RT at 286) and a meeting was set to view the property. ANDERSON testified:

Q. So with respect to my question, then, regarding whether or not there was a selection of options available to you at that first meeting, your answer is you don't recall?

A. Yes. (RT at 348)

On April 28, 1992, LINDGREN and TODD viewed the property with ANDERSON at 1428 & 1424 W. Grace.

Q. Did you have any discussions about how they were going to help you save your house, do you recall, during this tour?

A. No, I don't, not at this time.

Q. Did you sign any documents on that day, do you recall?

A. I do not recall. (RT at 290)

LINDGREN determines he is unwilling to lend any money on the property, especially behind an eighteen percent (18%) first mortgage.

A. And I said, "I'd like to list the house." And she said, "No, I do not want to sell it on the open market. I don't want to move, and I won't use Greg Jones and Associates.".

Q. Okay.

A. So Bryan then went on to set up a time for Ricky to come by. Ricky said, "I want to sell it to you." to Bryan. (TODD, RT at 810)

ANDERSON signs a letter authorizing CLS Mortgage to release certain information. (Exh. 182) ANDERSON is asked if she has an attorney and she states "She had a fine attorney in Greg Morrison, and that he had helped them greatly." (RT at 853) Based upon these discussions, ANDERSON and LINDGREN agree to meet to discuss final terms. (RT at 854)

On April 30, 1992, ANDERSON meets with LINDGREN at 1608 W. 8th Ave. # 201, TODD'S condo. TODD is present only as a witness. (RT at 171) LINDGREN reviews with ANDERSON his findings from CLS Mortgage and re-states the terms of the sale and goes over the letter of intent, with ANDERSON. (RT at 855) ANDERSON and LINDGREN sign the letter of intent. (Exh. 183) ANDERSON uses what has become her automatic "standard phrase" to a defense attorney's question.

Q. So I believe, Mrs. Anderson, yesterday you testified to a meeting at the condominium where the terms of this structured deal were gone over. Do you recall that today?

A. I do not sir, no. (RT at 355)

ANDERSON is questioned by defense attorney Mr. Backman about the "five or six " meetings held prior to the June 22, 1992 closing. ANDERSON uses her automatic

"standard phrase" five (5) times. She is unable to remember anything that LINDGREN or TODD said. Nothing! (RT at 360-361)

During the Memorial weekend, LINDGREN and TODD meet with ANDERSON at her yard sale. LINDGREN is hoping to meet Donald G. Anderson. (RT at 78) ANDERSON testified:

A. Yes, there was a visit in May because I had a yard sale and Lily and Bryan came up in the afternoon?
Q. Do you recall how long they were there?
A. Not very long.
Q. Did you have any substantive discussion about your agreement with the arrears?
A. I don't remember. (RT at 296)

On June 5, 1992, in compliance with the letter of intent and prior to closing, ANDERSON meets with LINDGREN regarding June's rent. (RT at 298) ANDERSON signs a rent receipt (Exh.90) and $ 300.00 is tendered to R. Maurice Cooper's Trust Account. (Exh. 188)

On June 16, 1992, ANDERSON receives letter from LINDGREN informing her of the need to close prior to the expiration of the cure date on the Trustee's Sale.

On June 20, 1992, ANDERSON has Donald G. Anderson sign a Special Power Of Attorney (SALE). (Exh.91) ANDERSON and Donald G. Anderson engage in a heated argument (RT at 303) but Donald G. Anderson does state he signed the document. (RT at 521)

On June 22, 1992, LINDGREN meets ANDERSON at 1428 W. Grace and transports both to the Closing Attorney, as ANDERSON has no car. (August 11, 1993 RT at 44) ANDERSON and LINDGREN meet with Naomi Wilbur-Thormahlen, real estate closing paralegal to attorney R. Maurice Cooper. (RT at 539-541, 543) ANDERSON reviews and signs a Residential Rental Agreement and

Security Deposit Receipt with Addendum. (Exh.185-3pgs.) (RT at 366-368) ANDERSON signs the Quit Claim Deed. (Exh. 186) Naomi Wilbur-Thormahlen testified as to ANDERSON'S state of mind, "she was excited" and what occurred that day. (RT at 539-542)

For the next nine (9) months, LINDGREN sent receipts and letters to ANDERSON, to keep her informed.

On September 15, 1992, the sewer connection is made. (RT at 679-681) ANDERSON is present during the entire process. (RT at 372-373)

On September 24, 1992, LINDGREN transports ANDERSON to a meeting with closing attorney, R. Maurice Cooper, where she re-signs the Quit Claim Deed. (RT at 309)

On October 20, 1992, TODD has a Realtors "for sale" sign placed upon 1424 W. Grace, the adjacent garage lots. (RT at 813-814) ANDERSON testified as to the " for sale" sign. (RT at 416-417) Donald G. Anderson states " I seen a sign out there I don't what it said." (RT at 527) "I never--it was a Realtor sign, but I never paid no attention." (RT at 528)

On November 10, 1992, LINDGREN sends ANDERSON certified letter concerning the demolition of small garages, removal of large saw and replacement of the chain link fence. (Exh. 199) (RT at 421-422) Receipts for the letter. (Exh. 98)

On December 4, 1992, at approximately 8:00 a.m. LINDGREN arrives at 1424 W. Grace with two (2) workmen. The work noise alerts Donald G. Anderson who is home. Mr. Anderson inquires as to what is going on. LINDGREN meets Mr. Anderson for the first time. Mr. Anderson claims to have no knowledge of the sale. On December 5, 1992, LINDGREN continues with workmen to replace the fence. Mr. Anderson states he has discussed the situation with ANDERSON. Mr. Anderson shows the small garages to LINDGREN and a discussion was had about moving any valuables out of the sheds. (RT 511-514)

Mr. Anderson lends some tools to help with the fence. (RT at 528) On December 16, 1992, LINDGREN begins demolition of the small garages. (RT 692)

On February 1, 1993, LINDGREN is Deeded the property from HOMESTEAD USA, LTD. for the purposes of financing and LINDGREN refinances 1428 W. Grace for $ 30,000.00. (Exh. 202) CLS Mortgage balance of $ 18,123.07 is paid off. (Exh. 203-204)

On March 16-17, 1993, demolition of the small garages is completed. (Exh. 110) (RT at 693) Which makes way for construction of a new home. (RT at 375)

On March 24, 1993, ANDERSON having not paid the rent and with $ 340.45 due and $188.11 utilities outstanding, is served with Notice to Pay or Move by the Property Manager for HOMESTEAD USA, LTD. (Exh. 49 pg.. 5-6) On March 30, 1993, ANDERSON having not complied, is served with an Eviction Summons and Complaint for Unlawful Detainer. (Exh. 49 pgs. 1-4) (RT at 375-376)

On April 15, 1993, ANDERSON files a Chapter 7, Bankruptcy. (Main Case, CR 1)

From April 16, 1993 to August 31, 1993, ANDERSON pays no rent causing a foreclosure action. ANDERSON testified:

Q. And from February, March--February or March of 1993 up until August of 1993, in fact, you didn't make your rent payments; is that correct?

A. That's true. (RT at 376)

On May 18, 1993, ANDERSON'S 341 creditor's meeting is held. ANDERSON, in the presence of counsel, discloses income not on her schedules.

On June 30, 1993, ANDERSON files Adversary Proceedings Cause No. A93-097-KIR. (Adv. Proc. CR 1)

On April 26, 1994, the day before trial, ANDERSON is served with a felony warrant and arrested for stealing

D.A.R.E. money, from C.O.P.S. West. (May 10, 1994, RT at 4-5 & 16-20)

On April 27, 1994, a six (6) day trial ensued.

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## REASONS FOR GRANTING THE WRIT

1. The U.S. Supreme Court has not settled what constitutes "was not a voluntary transfer".
2. The Ninth Circuit's own case law contradicts the court's rulings regarding a "voluntary transfer".
3. The Bankruptcy Judge does not believe in the law, as it now stands.
4. The District Court determined a case of "first impression" and denied withdrawal of reference.
5. The lower courts condoned conduct by a Plaintiff, which impugns the judicial system.

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**I. Does any Judicial Officer or Panel have the authority to "knowingly condone" Perjury by a Plaintiff ?**

**A. What would compel any Judicial Officer to engage in such an action?**

The answer is provided by the judicial officer, himself. Hon. Judge Klobucher does not believe in the law , as it now stands.

> "I feel compelled to add that I am not fully convinced we have correctly interpreted section 522 in concluding that the debtor must prove the transfer "was not a voluntary transfer" in order to avoid the transfer. I am unable to find any purpose to support that

conclusion. Why should the transferee be entitled to litigate that issue? If the transfer was a voluntary transfer it should nevertheless be avoided and the recovery should inure to the benefit of the estate." (Opinion at 13)

"... I still feel quite strongly that that -- there's something backward in that statute. I sent a copy of my opinion to George Treister, and if it makes you feel any better, he doesn't agree with me, he thinks it is fine the way it is. But if I had to go through this case again, I would compel the Trustee to join in the action. It certainly would have simplified this case." (Telephonic Hearing, Dec. 8, 1994., Adv. Proc. CR 142, at 10)

**B. ANDERSON lied under oath to seek judicial relief and the prior Opinion and Memorandum condone ANDERSON'S lies.**

These lies must carry even more weight because ANDERSON is an experienced litigator and the property at issue has been in litigation since 1986. (Adv. Proc. CR 19) ANDERSON'S lies are as follows:

**1. ANDERSON lied about never meeting the closing attorney, R. Maurice Cooper, at the "second signing" of the Quit Claim Deed, on September 24, 1992.**

"I never met Maurice Cooper" (RT at 306), "Mr. Cooper was not present, no." (RT at 369)

R. Maurice Cooper, an attorney of 50 years, Naomi Wilbur-Thormahlen, paralegal and LINDGREN testified about the "second signing" of the Quit Claim deed on September 24, 1992, as shown on the billing record (Trial Exh. 32), of R. Maurice Cooper.

Q. Okay. And who was present during that meeting?
A. First of all, it was just Bryan -- if I recall correctly, Naomi brought Bryan and Ricky -- or Mrs. Anderson in to my office, and then I discussed what -- why she was there. And then I buzzed Naomi on the intercom and asked her to come in and witness her signing the deed the second time. (Copper, RT at 623)
Q. (BY MR. BACKMAN) What perceptions, if any, did you have regarding Mrs. Anderson at that meeting?
A. I felt that she was satisfied with the transaction." (Cooper, RT at 626)
Q. (BY MR. BACKMAN) You were indicating what Mr. Cooper said in your presence and Mrs. Anderson's presence at that meeting in September of 1992.
A. He just explained to her that the title company needed her signature, and he explained to her why the title company needed her the signature, and so she signed again. (Wilbur-Thormahlen, RT at 546 )

Also see LINDGREN. (RT at 685-687)

**2. ANDERSON lied that the transaction was a loan and this was her primary complaint. She never argued a "lifetime lease". The trial court knew she lied.**

"... but she knew that it was more complicated than a simple loan of money." (Opinion at 4)
"I find that Mrs. Anderson was fully aware that she was conveying title to the property at the time she signed the documents in Mr. Cooper's office, although she was of the impression that she and her husband were retaining a lifetime lease." (Opinion at 6)

Q. So you felt that that meant you could stay in the house as long as you wanted whether you made

the rent payments or not?

A. They weren't rent payments, they were mortgage payments, sir. (RT at 357)

(See ANDERSON, Trial RT at 291, 294, 300, 308, 312, 321, 356, 357, 358, 368, 404, 411, 413, 414, 432) Also See AMENDED COMPLAINT, (ADV. PROC. CR 73)

**3. ANDERSON lied about her inheritance.**

MR. LINDGREN: Is the California inheritance of $ 1700 a correct figure?

MS. ANDERSON: As far as I know it was, yes.

(341 creditor meeting, May 18, 1993, RT, 9)

At trial, ANDERSON used her "standard phrase" of not remembering five (5) times and the final response is:

Q. You don't recall whether it was more than a hundred dollars?

A. I do not, no. (RT at 391)

**4. ANDERSON lied about the sewer situation.**

Compare the testimony of ANDERSON regarding Exhibit No. 179, (RT at 338) verses ANDERSON'S testimony regarding Exhibit No. 179, (RT at 418) and ANDERSON'S testimony that she was subject to a $ 100.00 per day fine for violation of the law. (Preliminary Hearing, August 11, 1993, RT at 40-41) Three different versions.

**5. ANDERSON is an admitted thief, having stolen money from the D.A.R.E. program, at C.O.P.S. West, while in Bankruptcy. She was served with a felony arrest warrant the day before trial, yet she tries to lie.**

Q. Okay. Mrs. Anderson, isn't it a fact that your duties at COPS West that you were--that you were suspended from your duties at COPS West in January of 1994?

A. I was on a leave of absence.

Q. Okay. And isn't it a fact that the purpose of this leave of absence was to conduct an inventory of the merchandise and cash at COPS West?

A. I do not know, sir

Q. Okay And so is it your understanding that you could go back to work there right now, Mrs. Anderson?

A. As far as I know, yeah. (May 10, 1994, RT at 5)

Q. Mrs. Anderson, isn't it a fact that on April 26th of 1994 you were served with a felony arrest warrant revolving around Second Degree Theft in your activity at COPS West during that period of time.

A. Yes, sir. (May 10, 1994, RT at 6)

Q. And you lied to me at that point in time, didn't you, Mrs. Anderson?

A. No, they said I could come back.
(May 10,1994, RT at 16)

**6. ANDERSON lied to other material facts and she was "coached" to use the scheme of "I don't remember", "I don't recall", or "I don't know."**

ANDERSON almost always used her "standard phrase" when asked a question by any defense attorney. Questioned about her Estate litigation she used her "standard phrase" five (5) times this is the final response.

Q. ...you have no idea between <u>one day</u> or <u>three years</u> how long that process went?

A. I have no idea, sir. (RT at 328-329)

(See ANDERSON at TRIAL, RT at 290, 291, 293, 294, 296,

299, 300, 301, 307, 328, 329, 333, 336, 337, 338, 339, 348, 351, 352, 353, 354, 355, 356, 358, 360, 361, 363, 366, 367, 368, 369, 374, 375, 379, 380, 389, 390, 391, 392, 394, 395, 397, 400, 408, 410, 412, 415, 416, 417, 420, 421, 422)

**7. ANDERSON lied as to why she did not seek legal counsel.**

No court, clear of bias, would believe that ANDERSON could not have received some advice from one (1) of her four (4) previous attorneys. The most recent attorney Greg Morrison had recently received $ 8,000.00 and her lack of money did not stop her previous litigations.

Q. (BY MS. GASCH) Mrs. Anderson, have you ever talked or consulted an attorney?

A. No, ma'am.

Q. Not ever?

A. I talked -- when I got the papers -- well I signed the papers for the mortgage company, for CLS, is the only time I talked -- when I the papers, and then when I went to Norm for help. (Preliminary Hearing, August 11, 1993, RT at 44)

Q. (BY MR. EBERLE) Would you state -- explain what Mr. Clausen had to do with Exhibit 169, your payment of $1540 to him?

A. At one time he represented my father-in-law.

Q. And did you ever go to Mr. Clausen anytime after that for legal advice?

A. No, I did not.

Q. You are acquainted with him, though?

A. He came to the house when my father-in-law was alive, yes.

Q. All right. He was considered to be your father-in-law's attorney?

A. In a roundabout way, yes.
Q. (BY MR. EBERLE) Can you identify who Tom Smith is?
A. He's an attorney.
Q. He represent you in the guardianship?
A. Not me.
Q. Who did he represent?
A. My father-in-law.
Q. Okay, who did Kathleen Taft represent?
A. Myself.
Q. And Neil Riley (phonetic)?
A. Myself.
Q. All right. And have you contacted any of those attorneys since then for legal advice?
A. No, I have not.
Q. You're familiar with them, though?
A. I know Kathleen, yes. (RT at 398-399)
Q. Did you talk to him with regard to your loan being in default?
A. No, I did not.
Q. Never asked him for advice?
A. No, I did not, because I had no money. (Trial at 405)
Q. Do you know Maurice Cooper?
A. No, I do not.
Q. How come you didn't go to Mr. Morrison's office?
A. I have no idea, Sir. Because he does not handle real estate. (Exh. 127, Deposition of Ricky Dale Anderson, at page 98 admitted into evidence Trial RT at 322)

**II. Does any Judicial Officer or Panel have the authority to make an affirmative conclusion based upon a <u>void record</u> or a <u>claim not pled</u> ?**

"I further conclude that under the facts of this case the transfer was not a voluntary transfer. Mrs. Anderson did not have knowledge of the availability of the bankruptcy process to alleviate her perilous position. She was never informed of that option by any of the defendants,..." (Opinion at 11)

**A. Complete speculation as the record is void as to ANDERSON'S knowledge of Bankruptcy.**

Had Hon. John Klobucher required, he could of asked Mrs. Anderson of her knowledge of Bankruptcy but that would have opened the door for the defendants to castigate her credibility, further.

Her attorneys never asked her about her knowledge or lack thereof. ANDERSON could have had superior knowledge of bankruptcy. This is just as plausible. The record is void. Had ANDERSON argued that she had no knowledge of Bankruptcy she would have been subjected to cross examination and testimony by witnesses to the contrary.

The only two references and ANDERSON'S potential knowledge are as follows:

Q. All Right. Legal Services assisted you in the preparation of this bankruptcy filing; is that correct?

A. Yes, sir.

Q. And did you contact them for the purpose of filing a bankruptcy or for the purpose of helping you in the unlawful detainer proceeding?

A. I contacted for bankruptcy, sir.
(Deposition of Ricky Dale Anderson, pgs. 12-13, entered into the record by Mr. Backman, RT at 322)

Q. Mr. Anderson, when did you first become aware that your wife had filed bankruptcy?

A. Not to long ago. I don't know when it was.
Q. Did she discuss it with you before she did it?
A. Well, I said something to that it -- we was going to have to do it, I thought, but I wasn't sure.
Q. And the reason that you thought you were going to have to file bankruptcy was because you were having problems with the IRS?
A. Yes. This started many years back, many years ago, it did. (Mr. Anderson, at 515-516)

B. **ANDERSON never pled that the transaction was a "lifetime lease" nor did she ever plead that she "did not have knowledge of the availability of the Bankruptcy process".**

"... although she was of the impression that she and her husband were retaining a lifetime lease." (Opinion at 6)
"Anderson testified that she believed she received what amounts to an indefinite lease on the property." (Memorandum at 3)

Q. (BY MR. EBERLE) Mrs. Anderson, you were asked with regard to your continued residing at the 1428 West Grace residence, and you mentioned something about you could stay there until you died as long as you paid the rent?
A. I didn't say the rent. I said the mortgage payment, sir. (RT at 413)

(See ANDERSON Trial RT at 291, 294, 300, 308, 312, 321, 356, 357, 358, 368, 404, 411, 413, 414, 432), also see AMENDED COMPLAINT, (ADV. PROC. CR 73)

## III. Congress has not defined "Voluntary Transfer", therefore, is it appropriate to expand the definition beyond the plain language of the statue or existing case law ?

There is no statutory provision, whatsoever, for "... did not have knowledge of the availability of the Bankruptcy process ..." nor is there any case law to support a finding of involuntary transfer. The clear intention of the statute does not support a requirement that a debtor have "no knowledge of Bankruptcy." There is no case law that supports the Bankruptcy Court's decision. This is new and expanded ground that is, wholly, inappropriate.

### A. ANDERSON, debtor, had the burden to prove that she did not intentionally transfer the property to the non-creditor, LINDGREN and his company.

Certainly, whether or not a transfer is voluntary or involuntary clearly is dependent upon the pre-existing relationship of the parties prior to the transfer. The court has placed undue emphasis and importance on *In re Reaves* 8 B.R. 177, (Bkrtcy. S.D. 1981) In that case, the Bankruptcy Judge redefined voluntary transfer.

The current courts have failed to distinguish the obvious difference between a preexisting creditor relationship and a transfer with a disinterested third party. The *Reaves* case, at page 181, states as follows:

> [1] For purposes of this decision, this Bankruptcy Court holds that an 11 USC Section 522(g)(l)(A) voluntary transfer occurs when a debtor, with knowledge of all essential facts and free from the persuasive influence of another, chooses of her own free will to transfer property to the creditor. A voluntary transfer does not occur where

> a creditor has harassed, insulted, and shamed a debtor into transferring the property to the creditor. Nor has a voluntary transfer occurred where a creditor has concealed or failed to inform a debtor of essential facts necessary for the debtor to make an intelligent decision on whether to transfer the property to the creditor. (emphasis supplied)

This Bankruptcy Court has expanded upon this existing case law. (See Opinion Letter, *passim*)

**1. The best evidence that a voluntary transfer occurred, is the undisputed fact, that ANDERSON re-signed the Quit Claim Deed at the "second signing", on September 24, 1992.**

The Bankruptcy Court completely ignored this momentous event in the Opinion Letter of August 8, 1994, as there is no mention, whatsoever. The Appeals Court was compelled to: "On September 24, 1992, Anderson again signed the quitclaim deed transferring the property. (Memorandum at 3)

ANDERSON signed the Quit Claim deed on June 22, 1992. (Opinion at 5) Three (3) months later, after the default has been cured and the threat of foreclosure is over. After the sewer is connected and the prosecution by the city is stopped. After the FHA appraiser viewed the property. On September 24, 1992, in the presence of R. Maurice Cooper, closing attorney, Naomi Wilbur-Thormahlen, para-legal and LINDGREN, ANDERSON resigns the Quit Claim Deed, again, of her own free will.

How many times does a person have to sign a deed to make it voluntary? I submit once but ANDERSON signed twice and the courts disregarded this fact, because it did not fit their agenda.

During the fifth (5th) day of trial all parties were directed by Hon. Judge Klobucher to look at *Phillips v. Blaser*, 13

Wn.2d 439, which states at 447:

> "That a deed regular in form is presumptive evidence of the highest character that voices the intention of the parties, that evidence relied on to prove that a deed is in fact a mortgage must be clear, cogent and convincing; that the evidence must show that it was intended by both of the parties; that a deed will not be held to be a mortgage when it appears that the grantee had declined to make a loan on the property."

This is why the courts hid from this event or view it as a non-event. Because the transfer was voluntary.

**2. The lower courts found no Washington Common Law Fraud, Tort for Business Conspiracy, Washington Fraudulent Transfer Act or any expressed misrepresentations.**

ANDERSON alleged all of those claims but the courts had to deny those allegations. LINDGREN was held liable for a violation of the Washington Consumer Protection Act, which does not require a showing of intent. LINDGREN absolutely denies this charge. The District Court stated:

> "Defendant Lindgren contends that there is nothing in the record to indicate that he made an affirmative misrepresentation to Mrs. Anderson to induce her into the transaction and, therefore, nothing to indicate that he violated the Washington Consumer Protection Act. Defendant's contention, however, misapprehends the nature of the Plaintiff's burden, for a plaintiff need not show either intent to deceive or actual deception. ...but rather whether their course of conduct was such that their acts had a capacity to deceive a substantial portion of the public. (Order Re: Bankruptcy Appeal at 18)

> "Thus, while Lindgren may have made no actual express misrepresentation to Mrs. Anderson, his conduct was likely to deceive and therefore Mrs. Anderson has met her first burden." (Order Re: Bankruptcy Appeal at 20)

Existing case law requires a showing of fraud or at least misrepresentation. LINDGREN made an offer, which ANDERSON accepted but LINDGREN did not advise her about Bankruptcy, which he had no duty to do. This is an erroneous decision.

**B. Let's examine *In re Davis* 169 B.R. 285 (Bankr. E.D.N.Y. 1994), which Respondent terms, "which is remarkably similar to the Anderson case," (Appellee's consolidated brief at 13), with the subject case.**

In *Davis*, the Davises paid to Mr. Suderov $ 4,000.00 prior to the sale. ANDERSON made, prior to the transfer, a partial payment on June 1st's rent, $ 300.00 (Exh. 27), but she paid none of the costs or fees.

In *Davis*, Tammy Davis was reduced periodically to tears at the closing. Closing para-legal Naomi Wilbur-Thormalen testified ANDERSON was "she was excited" (RT at 540) and "that if they want the documents faxed to an attorney, their family attorney, we would be more than happy to do that. And she said no, she understood everything. She was totally happy with it, and I asked her, I said now, are you going to sign this of your own free will? And she said yes." (RT at 541)

In *Davis*, the Davises received no money. ANDERSON received no money, initially, but she would have been paid $ 2,500.00, at vacation, under the terms of the agreement of the Residential Rental Agreement and Addendum. (Exh. 29)

In *Davis*, Tammy Davis had an immediate liability,

guaranteed by her parents, of $ 12,719. Mrs. Suderov became a creditor on closing. LINDGREN never was a creditor. ANDERSON'S only obligation was to make her rent payments, which were the same as her previous mortgage payment, except the taxes and insurance were calculated monthly and included in the rent, not in lump sums.

In *Davis*, one month after closing and two weeks after the first rent payment was due, Mrs. Suderov perfected a judgment for $ 14,779.56 and a warrant of eviction was issued. Tammy Davis was served with an income execution. ANDERSON made her rent payments for nine (9) months before she defaulted. She made no rent payments for an additional eight (8) months.

In *Davis*, there was misrepresentation. In ANDERSON, the court found no fraud or misrepresentations. The court did find that a substantial portion of the public could be deceived by the offer, a charge LINDGREN absolutely denies.

ANDERSON lied about the transaction. LINDGREN did each and everything he promised. ANDERSON defaulted and LINDGREN only followed his legal remedies.

### C. The Court of Appeals for the Ninth Circuit own case law conflicts with this ruling.

There can only be one (1) standard for "was not a voluntary transfer". The courts can not have it both ways, so as to flip flop, whenever it suits their agenda.

***In re Glass*, 60 F. 3d 565 (9th Cir. 1995)**

> "The BAP's analysis of the statutory language is more compelling than that of the bankruptcy court. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) ("The plain

meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." (internal quotation and brackets omitted)) The bankruptcy court did not reach the question of the purpose behind 522 (g), which other courts have observed was to allow an exemption "where a property interest has been involuntarily taken from a debtor by means such as execution, repossession or certification of a judgment, [because] it would be inequitable not to permit a debtor to assert an otherwise allowable exemption..." *In re Savage*, 92 B.R. 259, 261 (Bankr. S.D. Ohio 1988) (emphasis added); *see also Snyder*, 108 B.R. at 152; *In* re *Trevino*, 96 B.R. 608, 613 (Bank. E.D.N.C. 1989); *In re Nolen*, 40 B R. 6, 8-9) (Bank. M.D. Ala. 1984); *In* re *Ziegler*, 20 B.R. 449, 452 (Bankr. S.D. Ohio 1982)," *Id.* at 569

***In re Snyder*, 108 B.R. 150 (Bkrtcy. N.D. Ohio 1989)**

"In the *Trevino* case the Court stated that a transfer is involuntary only when it is beyond the debtor's personal control." *Id.* at 152 (emphasis added)

***In re Trevino*, 96 B.R. 608 (Bkrtcy. E.D.N.C. 1989)**

"The court cannot accept the debtors' argument that any transfer of property in full or partial satisfaction of preexisting debt is not a voluntary transfer for purposes of 522(g) and (h) " *Id.* at 613

"[9,10] The debtors have the burden of showing that a transfer was not voluntary under 11 U.S.C. 522 (g) and (h) *In re Dargis*, 36 B.R. 866, 868 (Bankr. E.D.P.A. 1984), ... *Id.* 613

***In re Nolen*, 40 B.R. 6 (Bkrtcy. M.D. Ala. 1984)**

> "The definition of "voluntary transfer" as used in this subsection is not defined in the Bankruptcy Code." *Id.* at 8
>
> "Thus voluntary is given its ordinary meaning, that is, that it was intentionally transferred away by the debtor." *Id.* at 9 *"In re Reaves* (Bkrtcy. S.D. 1981) 8 B.R.177. In that case, the Bankruptcy Judge redefined voluntary transfer ... The thrust of that decision is that a transfer is not voluntary where the transferor was imposed upon by the transferee creditor after severe pressure and without fully divulging all of the facts to the transferor. The definition there thus becomes a definition which includes the elements of "knowing" and "freely made." *Id.* at 9 (emphasis added) "And we think he made the transfer of his free will, not to the creditor, that is, ..." Id. at 9 (emphasis added)

**IV. Is it appropriate, in a case of "First Impression", a "Private Action", under the Washington Consumer Protection Act, to require an Investor, to provide a duty, to give legal advice regarding Bankruptcy, meanwhile ignoring the pervasive influence of another party ?**

**A. A case of "first impression".**

A purchaser of real estate has never been held liable in a "private action" under the Washington Consumer Protection Act. There is no case law on this regard. The District Court denied "withdrawal of reference". (95-CS-18-JLQ, CR 1 & 10) Order (95-CS-18-JLQ, CR 18)

**B. A purchaser of real estate to provide a duty by giving legal advice.**

The court believes it is deceptive "to seek out people who are under the obvious duress of foreclosure upon their homes" (Opinion at 18) and not give legal advice about Bankruptcy, "She was never informed of that option by any of the defendants, ..." (Opinion at 11)

Congress has not made people in foreclosure a protected class of citizens. It is not illegal to contact people in foreclosure and it happens thousands of times a day. LINDGREN was not there to give legal advice and had he given legal advice he would have been practicing law without a license. LINDGREN made an offer for a real estate transaction, which ANDERSON was free to reject. LINDGREN testified:

Q. Wouldn't it be important to understand her financial situation in order to be able to give her proper advice as to what option she might be able -- to handle; isn't that true.

A. No, it's not true I was not there to give her advice, I was there looking at a potential real estate investment. (Prelim. Hearing, August 12,1993, RT at 43)

Q. Was there any conversation at this meeting on -- at the Anderson home about having legal representation.

A. I asked Mrs. Anderson if she had an attorney who could help her with the transaction, or with her situation. She told me that at that time that she had a very fine attorney in Greg Morrison, and that he had helped them greatly. (RT at 853)

Q. Now, you never suggested to Ms. Anderson, did you that she consult with an independent party before signing that document, did you?

A. No, I did not. Mrs. Anderson indicated at the first meeting she had an attorney (RT at 172)

LILY TODD testified to ANDERSON'S attorney situation.

Q. And did Mrs. Anderson ask you for advice?

A. No, she did not (RT at 841)

Q. When you were at her home, did she indicate whether she had third party independent legal advice?

A. She spoke glowingly of her attorney, Greg Morrison

Q. And why did Mr. Morrison's name come up in that conversation?

A Mr. Lindgren asked her if she had an attorney, and she said yes, she did , Greg Morrison (RT at 841-842)

**C. The court ignores the real persuasive influence on ANDERSON, that of Mr. Anderson.**

"... free from all persuasive influence of another, chooses of her own free will to transfer property to another." (Opinion at 11)

On or before June 20, 1992 and the execution of the Special Power Of Attorney (SALE), (Trial Exh. 91) ANDERSON had a conversation with Mr. Anderson.

Q. Okay. Mrs. Anderson, when you presented that to your husband, did you have a discussion with him in detail about what was going on?

A. I told him I needed his power of attorney to save our house, and he got very angry with me.

Q. And how did he express his anger with you?

A. He called me names in front of --

A. Verbally abused me in front of people that were at our home. He swore at me. The stress was just horrible. I was crying. (RT at 303)

ANDERSON testified that LINDGREN and TODD were always cordial.

Q. Qkay. Now, as I recall from your prior testimony, that Mrs. Todd was always cordial to you; is that correct?
A. Yes, Sir.
Q. And Mr. Lindgren was always cordial to you; is that correct?
A. Yes, Sir. (RT at 348)

"Lindgren admits that Anderson was adamant that she did not want to sell the property." (Memorandum at 2)

The appeals court tries to shape the testimony for its own agenda. LINDGREN never admitted such a thing and the persuasive influence of another is quite clear. ANDERSON did not want to sell on the open market because she tried to hide her conduct from her husband and LINDGREN had no knowledge, this was her plan.

A. "...and she was adamant that she did not want to sell the property, she didn't want to deal with Greg Jones and list the property, whatever it took to stay in the property.
Q. And when you say she didn't want to sell the property, you mean on the open market?
A. That's correct, on the open market. She wanted to sell the property to someone like Homestead USA Limited and wanted to stay in the property. (LINDGREN, August 12, 1993, Preliminary Hearing, RT at 23)

Lily Todd testified as to what occurred at the April 28, 1992 meeting, Trial RT at 810:

"And I said. "I'd like to list the house." and she said "No, I do not want to sell it on the open market. I don't want to move, and I won't use Greg Jones and Associates." "So Bryan then went on to set up a time for Ricky to come by. Ricky said, I want to sell it to you," to Bryan."

When ANDERSON went to the closing attorney to sign the documents on June 22, 1992, "she was excited". Naomi Wilbur-Thormahlen testifies.

A. I'd say she was excited. She talked about her husband being a truck driver. My son is a truck driver. We discussed long haul trucking, and she was very excited to get this all taken care of. She would still have a home to live in, no worries. (RT at 540-541)

**V. Does any Judicial Officer or Panel, have the authority to award attorney fees under the WCPA, when such fees are not segregated and the fees requested are based upon a fraudulent affidavit ?**

The case law is clear. Attorney fees can not be awarded for dismissed defendants, unfounded claims or for bankruptcy. There has not been a segregation of these lump sum fees, in violation of Washington State Law.

The District Court ordered Columbia Legal Services by Mr. Sola to re-submit an affidavit segregating the request for attorney's fees. Mr. Sola presented to the court a fraudulent affidavit, not supported by any time sheets, which the most generous court described as:

"However, the request for attorney fees reflects no itemization showing any attempt to segregate the two, and the total request represents only an insignificant reduction from the original attorney fees request."

(Order Re: Punitive Damages And Attorney Fees at 8)

The District Court proceeded to try to "split the baby" but the court did not segregate out attorney fees expended on dismissed defendants or segregate attorney fees expended on unsuccessful claims.

***In re Bowers v. Transamerica Title Ins.*** **100 Wn, 2d 581**
[No. 48036-2 En Banc. December 15, 1983]

"The attorney fee to be allowed for successfully pursuing a private action under the Consumer Protection Act must be based upon the hours reasonably expended and adequately documented by counsel after disregarding time spent on unsuccessful claims or duplicated effort?"

***In re Schmidt v. Cornerstone Investments, Inc.***
115 Wn. 2d 148 (1990)

"Prevailing parties in Consumer Protection Act case were not entitled to award of legal fees, as they had presented aggregate figure, possibly including 13 issues not related to the Act, which could not be lumped together and awarded under the Act."

***In re Sign-O-Lite Signs, Inc. v. Delaurenti Florists, Inc.***
64 Wn. App. 553 (1992) review denied 120 Wn. 2d 1002

"Time spent developing theories essential to Consumer Protection Act (CPA) claim must be segregated from time spent on legal theories relating to the other causes of action for the purposes of award of attorney fees and costs under CPA."

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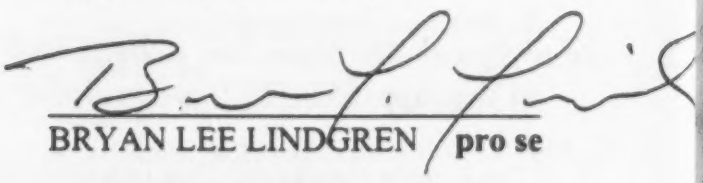
## CONCLUSION

Nothing in the record shows that LINDGREN made any decisions for ANDERSON nor did he tell her what to do. The record is replete with examples that ANDERSON does not remember a thing, except it was a loan. LINDGREN did each and everything he promised. ANDERSON defaulted and then lied to seek judicial relief. ANDERSON had personal control of the transaction and she voluntarily made the transfer of her own free will. The lower courts condoned the actions of the plaintiff because they felt she did not get a "good deal". But the sole function of the courts is to enforce the law.

For the reasons contained in this petition, a writ of certiorari should be issued.

Respectfully Submitted,



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## APPENDIX A

United States Bankruptcy Court
Eastern District of Washington

John M. Klobucher
Bankruptcy Judge

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August 8, 1994

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Mr. Bryan Lee Lindgren
1608 W. 8th, #201
Spokane, WA 99204

Re: Anderson v. Homestead et al, Adv.
No. A93-0097-K1R

Filed August 8, 1994

Dear Counsel and Mr. Lindgren:

## Issue

Mrs. Anderson, a chapter 7 debtor, brought this action to avoid the fraudulent transfer of real property in which she intends to claim a homestead exemption. 11 U.S.C. § 522. The debtor may avoid the transfer to the extent that she could have exempted the property under § 522 (g) (1) if the transfer is avoidable by the trustee, and the trustee did not attempt to avoid it. 11 U.S.C. §522 (h) and 548.

The trustee has not participated in this action. Therefore, the debtor has the burden of establishing not only the elements of a fraudulent transfer pursuant to § 548, but also, pursuant to §522 (g) (1), the burden of establishing that the transfer "was not a voluntary transfer".

## Facts

On January 17, 1991 the debtor and her husband borrowed $19,500.00 from CLS Mortgage, Inc.. In return, they granted to CLS a first deed of trust on their residence and two adjoining lots. Their monthly loan payments fell into default and the successor of CLS, pursuant to Washington law, issued a notice of foreclosure advising that the default could be cured up to June 29, 1992 by the payment of $2,810.88 inclusive of all fees and expenses. Otherwise, the property was noted for a non-judicial foreclosure sale on July 10, 1992. The debtor's husband, a truck driver, was temporarily unemployed, and the debtor was unemployed. They had no firm prospect of curing the default within the prescribed time.

The defendant, Bryan Lee Lindgren, is an experienced real estate salesman and entrepreneur. He had been licensed as a real estate agent in the states of Washington and Montana, but

is not licensed at the present time. In November of 1991, Mr. Lindgren caused the incorporation of Homestead USA, Ltd. under the laws of the State of Nevada. He was at that time incarcerated under a federal felony conviction, but accomplished the incorporation with the assistance of a prior acquaintance, defendant Lily Todd. Ms. Todd has acted as the sole officer and director of Homestead USA Ltd. and was a shareholder in the early stages of operation, but there is no evidence that she maintained any financial interest in Homestead USA, Ltd. between April of 1992 and June 22, 1992, the period of time which is critical to the transaction at issue.

On March 26, 1992, Ms. Todd filed Articles of Incorporation for a second corporation, Homestead USA of Spokane, Inc.. Ms. Todd was at that time a licensed real estate agent working for the firm of Gregg Jones and Associates. Shortly thereafter, she acquired her own broker's license and transferred her real estate activities to the second corporation.

During the critical time in question, Mr. Lindgren and Ms. Todd both resided at the sane address of 1608 W. 8th in Spokane. Both corporations also operated from that address. Although there has been considerable interplay between the two corporations, I have concluded that during the course of the transaction at issue, Ms. Todd was operating the Homestead USA of Spokane activities and that, while she remained the titular head of Homestead USA, Ltd., she had no financial interest therein and did not directly participate in the transaction at issue.

After Mr. Lindgren was released from custody, he examined the records of Spokane County to determine the names and addresses of people whose properties were in the throes of foreclosure proceedings. Among those were the plaintiff, Ricky Anderson and her husband.
On April 16, 1992, he addressed a letter to Mr. Anderson

saying, "Please give me a call, if I can help with:

Buying
Selling
Lending

on your home." Mrs. Anderson responded to the letter and was invited to the defendants' residence at 1608 W. 8th. She was met there by Mr. Lindgren who invited her inside and introduced her to Ms. Todd. Ms. Todd presented her with the business card of "Gregg Jones and Associates, Real Estate Professionals".

Mrs. Anderson explained her plight. Mr. Lindgren offered to explore the matter further, but explained to Mrs. Anderson that she basically had limited options, which were to sell, refinance, or lose the property.

During the next few days Mr. Lindgren and Ms. Todd examined the premises and visited with Mrs. Anderson. Mrs. Anderson informed Ms. Todd and Mr. Lindgren that she definitely did not want to list the property for sale and would prefer that they help her find some way to cure the default on the deed of trust. Mr. Lindgren prepared for her signature a letter authorizing CLS to release information regarding the deed of trust to Homestead USA, Ltd..

Mr. Lindgren gathered the necessary information and drafted a document which appears to be a commitment letter dated April 30, 1992. The document is titled "STRUCTURE". This document initially states that Homestead will cure the default and prevent the pending foreclosure by paying various expenses, which are then listed in detail. The document then provides that Homestead will rent the property to "the seller" at cost, which was at that time calculated at $420.00 per month, with the first payment due on June 1st. It further provides that the Andersons will be paid $2,500.00 upon

vacation of the property unless they are for any reason evicted. The document is signed by Mrs. Anderson and by Bryan Lindgren on behalf of Homestead USA, Ltd.. The document does not specifically provide that the Andersons would deed or convey the property to Homestead, but anyone of normal intelligence who carefully read the entire document would certainly come to that conclusion. I find that Mrs. Anderson was at that time in a distraught state of mind and confused as to the exact nature of the proposal, but she knew that it was more complicated than a simple loan of money.

By letter dated June 16, 1992, Mr. Lindgren informed Mrs. Anderson somewhat urgently that they needed to sign documents at an attorney's office or the foreclosure sale would proceed. Mrs. Anderson's husband was again employed as a long haul truck driver and was not always available to sign documents. Consequently, on June 20th, Mrs. Anderson obtained her husband's signature on a Special Power of Attorney which permitted her to act on his behalf.

On June 22, 1992, just one week before expiration of the time within which the default could be cured, Mr. Lindgren accompanied Mrs. Anderson to the office of his attorney, R. Maurice Cooper. Mr. Cooper was not in at the time, but the documents which Mr. Cooper had prepared were signed in the presence of his paralegal. The documents consisted of a Quit Claim Deed whereby Mrs. Anderson and her husband conveyed title to the property to Homestead USA, Ltd. in consideration of assumption of the existing debt, and a residential rental agreement whereby Homestead agreed to rent the residence back to the Andersons for an "indefinite" period of time at a monthly rental of $420.00. The lease was not acknowledged and I conclude that it is ineffective under Washington law other than as a month to month tenancy. Mrs. Anderson had already paid part of the first month's rent, which began as of June lst and paid the remainder at that time. She

received no money for the conveyance. Monthly payments on the CLS obligation were $351.36 per month. Mr. Lindgren testified that the additional rental of approximately $70.00 per month was calculated to cover future costs of insurance and taxes.

Thus, the entire transaction was structured in such fashion that Homestead received title to the property for a cash outlay of approximately $4,000.00 which would cure the CLS default. Although the property remained encumbered for about $16,000.00, the anticipated rental would service that debt and cover the taxes and insurance. I find the fair market value of the property, consisting of the residence and the two adjoining lots, at the time of conveyance to have been at least $62,000.00.

After the transaction was completed, Mr. Lindgren concentrated his efforts toward sale of the two lots adjoining the residence. He deemed it advisable to remove two outbuildings from the lots and to relocate a fence before the lots were marketed. His presence on the property prompted an inquiry from Mrs. Anderson's husband, and it was not until that time that Mr. Anderson learned that his wife had conveyed the property. His dismay was so intense that he refused to voluntarily participate in these proceedings.

In January of 1993, Mr. Lindgren borrowed the sum of $30,000.00 from Equity Mortgage Services, from which he paid off the CLS debt. In return for the loan, he granted Equity Mortgage a deed of trust on the residence without the adjoining lots. In April of 1993, he sold the adjoining lots to a developer, Gary E. Fickle, for $9,000.00 net.

At the time of trial, the residence remained encumbered by the Equity Mortgage obligation in the amount of $29,076.00, which is $10,962.00 in excess of the CLS encumbrance at the time it was paid off. Thus, the net value of the residence at the time of trial was $19,962.00 less than the value of the entire

property at the time of transfer.

In March of 1993, the Andersons became delinquent in their rental payments and Homestead commenced an eviction action which precipitated this bankruptcy.

I find that Mrs. Anderson was fully aware that she was conveying title to the property at the time she signed the documents in Mr. Cooper's office, although she was of the impression that she and her husband were retaining a lifetime lease. I further find, however, that she would not have conveyed the title if at that time she had known of the availability of the Chapter 13 bankruptcy process. It was represented to her by Mr. Lindgren in the presence of Ms. Todd, a licensed real estate professional, that her options were limited to those which Mr. Lindgren professed. The documents were prepared by an attorney and executed in his office, lending further credence to Mr. Lindgren's representation and to her belief that this was her best available option to retain possession of her residence. In fact, her financial predicament at that time presented the typical situation which is routinely resolved in this Court on a daily basis. Attorneys who practice regularly under Chapter 13 in this Court frequently accept employment without payment of fees in advance and are compensated through the Chapter 13 plan as an administrative expense.

## Legal Analysis

I. Has the debtor met her burden of establishing the elements of a fraudulent transfer pursuant to 11 U.S.C. $ 548?

It is virtually uncontested that all of the elements of 11 U.S.C. § 548 governing fraudulent transfers are satisfied in this case. 1) The transfer of title to the property was made within one year before the date of the filing of the petition. 2) The debtor received less than a reasonably equivalent value

in exchange for such transfer. The adjacent lots have an established value of $9,000.00. Even the defendants' appraiser opined that the fair market value of the house alone was $53,000.00 at the time of the transfer. This would mean that the debtors transferred an equity in excess of $40,000.00 in return for a month to month tenancy and a prospective payment of $ 2,500.00 at such time as they surrendered possession of the residence. 3) Clearly the debtors were insolvent on the date that such transfer was made, or became insolvent as a result of such transfer. These three elements are the only criteria which the trustee need establish in order to avoid the transfer under section 548.

Thus, if the trustee had commenced this action the transfer would have been summarily avoided without regard to whether the transfer was "voluntary or involuntary". Section 548 was in fact amended in 1984 to specifically clarify that issue by inserting the words "voluntarily or involuntarily". If the trustee had commenced this action under section 548, and had recovered the property under section 550, the debtor could have claimed the property exempt pursuant to the provisions of section 522 (g), but only if the transfer was not a voluntary transfer and it the debtor did not conceal the property. But the trustee did not commence this action. The debtor did, as she is permitted to do by section 522 (h).

Section 522 (h) provides as follows:

> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g) (1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724 (a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

Pursuant to the above section the debtor may avoid a transfer only "to the extent that the debtor could have exempted such property under subsection (g) (1) of this section if the trustee had avoided such transfer".

Subsection (g) provides:

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510 (c) (2}, 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1) (A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f) (2) of this section.

II. Was Mrs. Anderson's transfer of the property "not a voluntary transfer" within the meaning of 11 U.S.C. 522 (g) (1) (A)?

The first Court which appears to have addressed the meaning of "voluntary transfer" and to have analyzed the term with respect to the knowledge and state of mind of a debtor is In re Reaves, 8 B.R. 177, 181 (Bkrtcy. D.S.D. 1981) wherein the Court stated:

> "For purposes of this decision, this Bankruptcy Court holds that an 11 U.S.C. Section 522 (g) (1) (A) voluntary transfer occurs when a debtor, with knowledge of all essential facts and free from the persuasive influence of another, chooses of her own free will to transfer property to the creditor. A voluntary transfer does not occur where a creditor has harassed, insulted, and shamed a debtor into transferring the property to the creditor. Nor has a voluntary transfer occurred where a creditor has concealed or failed to inform a debtor of essential facts necessary for the debtor to make an intelligent decision on whether to transfer the property to the creditor. This is especially true where a debtor can show that she would not have made the transfer had she been informed of all the essential facts."

The above definition was considered and expanded upon by Judge Twardowski in In re Seidel, Bkrtcy., 27 B.R. 347 (1983) at 352:

> [4] In determining the voluntariness of a transfer, the Reaves Court appears, at times, to place greater emphasis upon the freedom from persuasive influence than upon the knowledge of all essential facts. However, we believe that we are consistent with Reaves and with the spirit of the Bankruptcy Code in holding that a voluntary transfer of property does not

> occur where a debtor does not have knowledge of all of the essential facts pertaining to the transfer, the creditor to whom the transfer is made fails to inform the debtor of any essential facts within the creditor's knowledge, and the debtor would not have made the transfer had he been aware of all of the essential facts.

I have considered both dissertations and adopt the definition that an 11 U.S.C. § 522 (g) (l) (A) voluntary transfer occurs when a debtor, with knowledge of all essential facts and free from the persuasive influence of another, chooses of her own tree will to transfer property to another.

I further conclude that under the facts of this case the transfer at issue was not a voluntary transfer. Mrs. Anderson did not have knowledge of the availability of the bankruptcy process to alleviate her perilous position. She was never informed of that option by any of the defendants, nor was she ever advised to seek legal assistance. I recognize that the record is void of any evidence that either Mr. Lindgren or Ms. Todd had personal knowledge of the availability of the Chapter 13 process, but I do not find that void to be dispositive of the nature of the transfer in this case. I believe the state of mind of Mrs. Anderson to be the prevailing factor in this case. Mrs. Anderson was dealing with people who represented themselves to be real property professionals, and Mr. Lindgren represented to her the specific options which were available to her without addressing the only option which was truly available if she wished to retain both possession of the property and her equity therein. I find that her decision to transfer the property was precipitated by the persuasive, ill advised and inaccurate guidance of the defendant, Lindgren.

The defendants seek solace in BFP v. Resolution Trust Corporation, No. 92-1370 (U.S. May 23, 1994), which

holds that a non-collusive and procedurally regular foreclosure sale is not avoidable under section 548. I find nothing in that opinion which would suggest that a transaction of the nature with which we are concerned would receive any immunity from section 548. The dissenting justices did not so interpret the majority opinion. Their opinion was apparently available to the majority and the majority did not take exception to that interpretation. In footnote 11 at page 12 of the dissenting opinion Justice Souter states as follows:

> "Indeed, it is not clear from its opinion that the Court has "come to grips," *ante*, at 7, with the reality that "involuntary" transfers occur outside the real property setting that legally voluntary transfers can be involuntary in fact, and that, where insolvent debtors on the threshold of bankruptcy are concerned, transfer for full, "fair market" price are more likely the exception than the rule. On the Court's reading, for example, nothing would prevent a debtor who deeded property to a mortgagee "in lieu of foreclosure" prior to bankruptcy from having the transaction set aside, under the "ordinary[y,", *ante*, at 14, substantive standard.

I feel compelled to add that I am not fully convinced we have correctly interpreted section 522 in concluding that the debtor must prove the transfer was "not a voluntary transfer" in order to avoid the transfer. I am unable to find any purpose to support that conclusion. Why should the transferee be entitled to litigate that issue? If the transfer was a voluntary transfer it should nevertheless be avoided and the recovery should inure to the benefit of the estate. The issue of whether the transfer was voluntary or involuntary, if it is an issue, should be litigated between the debtor and the trustee or the

creditors of the estate, who are the real parties at interest. If the debtor had proved unsuccessful in the case at bar, surely the trustee would have commenced an action under section 548 without regard to the voluntariness of the transfer.

I suggest that a more logical approach would be for the debtor to commence and maintain an action under section 548 in the event of the trustee's failure to do so. If the debtor is successful and makes a recovery under section 550 the debtor may at that time claim an exemption as to all or part of the recovery pursuant to section 522 and the trustee or the creditors may challenge that claim on the grounds, among others, that the debtor had forfeited her right to the exemption by having concealed the property or by having voluntarily transferred the property for less than a reasonably equivalent value.

This concept would be consistent with subsections 522 (i) and (j), which provide as follows:

> (i) (1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.
>
> (2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724 (a) of this title, under subsection (f) or (h) of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g} of this section or paragraph (1) of this subsection.

> (j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

I will admit, however, that my concept does not follow from a literal interpretation of subsection (h) nor have I found any case law to support it. I merely suggest that it is arguably a reasonable interpretation of section 522, when read as a whole and perhaps one that would be deserving of legislative clarification.

I conclude from the above that the plaintiff is entitled to avoid the transfer under section 548 and recover the residence from the defendant, Homestead U.S.A., Ltd., pursuant to section 550. Having found that the property has been devalued by the sum of $19,962.00, I further conclude that the plaintiff is also entitled to Judgment against the defendants Homestead U.S.A., Ltd. and Bryan Lee Lindgren pursuant to section 550, but that those defendants are entitled to an offset for funds expended toward taxes and improvements. I find that Mr. Lindgren advanced expenses toward preservation of the property in the following amounts:

| | |
|---|---|
| $4,684.32, | CLS cure |
| $1,371.00, | taxes 1991-'92 |
| $3,795.43, | sewer and allowable expenses of preparing the lots for sale |
| $9,850.75, | Total |

It is unclear at this time whether the judgment should inure to the benefit of the debtors or to the benefit of the estate.

I further conclude that the property recovered shall be preserved for the benefit of the debtor pursuant to section 522 (i) (2) to the extent that the debtor may exempt the same. The debtor may amend her schedule of exemptions and serve appropriate notice upon all members of the master mailing list.

I further conclude that it is unnecessary and inappropriate for the Court to fix the precise value of the residence at this time other than that its fair market value is at least $53,000.00 for the purposes of this litigation.

I further conclude that the evidence is insufficient to support an imposition of liability upon either of the defendants Homestead, U.S.A. of Spokane or Ms. Lily Todd.

I will next address the issue of whether or not the conduct of the defendants, Bryan Lindgren and Homestead U.S.A., Ltd., constituted a violation of R.C.W. 19.86, the Washington Consumer Protection Act (CPA). The first two sections of that Act provide as follows:

19.86.010. **Definitions**

As used in this chapter:

(1) "Person" shall include, where applicable natural persons, corporations, trusts, unincorporated associations and partnerships.

(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

(3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

**19.86.020 Unfair competition, practices, declared unlawful**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

For a private individual to initiate an action under the CPA "the conduct complained of must: (1) be unfair or deceptive; (2) be within the sphere of trade or commerce; and (3) impact the public interest." Haner v. Quincy Farm Chemicals, Inc., 97 Wn.2d 753, 759, 649 P. 2d 828.

The conduct concerned is obviously within the sphere of trade or commerce as the sale of real property is specifically included in the legislative definition set forth above.

I believe the impact upon the public interest to be likewise obvious. The number of persons who avail themselves of the Chapter 13 bankruptcy process is a frequently published matter of public record. The typical case involves persons who are under threat of losing their residence under some form of foreclosure proceedings. They have been afforded protection of the bankruptcy process by Congress as authorized by the constitution of the United States, and any activity which interferes with the protective privileges afforded is certainly a matter of public interest.

Whether or not the conduct in question was "unfair or deceptive" is an issue which involves a more subjective analysis than the other issues. Numerous Washington cases on the subject lead me to conclude that this element, unless specifically addressed by the legislature, is a factual issue which must be addressed on a case by case basis. Certainly there are situations where it would be neither unfair nor deceptive to encourage the conveyance of real property in return for the retention of a lifetime interest. Such transactions are commonly employed among family members in the

interest of estate planning. The question presented here, however, is whether or not it is unfair or deceptive to seek out people who are under the obvious duress of foreclosure upon their homes and entice them to surrender ownership of a substantial equity in return for a tenuous right of possession, under the guise that this is their only alternative to eviction. Under the totality of the circumstances of this case I find that the conduct was nothing less than unfair and deceptive.

I remain mindful of the fact that there is a void of evidence in this case that Mr. Lindgren had personal knowledge or expertise in the bankruptcy field. The courts of Washington, however, have repeatedly acknowledged the established principles that intent to deceive and proof of a specific party being deceived are not necessary predicates to a CPA violation. State v.A.N.W. Seed Corporation, 116 Wn. 2d 39, 50, 802 P. 2d 1353. I find that the actions of the defendant Lindgren in this case had the tendency to deceive and that they have the potential for repetition.

I conclude from the above that the defendants, Lindgren and Homestead U.S.A., Ltd., are liable for violation of the Washington CPA, and that pursuant to R.C.W. 19.86.090 the damages awarded should be increased by the additional amount of $10,000.00 and that the plaintiff is entitled to an award of reasonable attorneys' fees.

This opinion will constitute the findings of fact and conclusions of law herein. I direct that the plaintiff's attorneys shall submit time and expense statements and shall confer with the Chapter 7 trustee regarding the form of judgment to be submitted.

Very truly yours,

/s/ John M. Klobucher

John M. Klobucher

**APPENDIX B**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE:
RICKY DALE ANDERSON, Debtor.

RICKY DALE ANDERSON, Appellant,

vs.

HOMESTEAD USA LTD., HOMESTEAD USA OF SPOKANE, INC., LILY M. TODD, BRYAN L. LINDGREN, and DONALD G. ANDERSON, Appellees.

NO. CS-95-018-JLQ

BK. NO. 93-01055-KIR
ADV. NO. A93-097-KIR

Filed July 10, 1995

Justin L. Quackenbush
Senior U.S. District Judge

ORDER RE: BANKRUPTCY APPEAL

This matter comes before the court on appeal from a decision rendered by the Bankruptcy Court for the Eastern District of Washington wherein that court avoided the transfer of Debtor Anderson's real property to Appellee Bryan Lindgren pursuant to section 548 and section 522 of the

bankruptcy code. Also before this court for review are the Bankruptcy Court's proposed findings of fact and conclusions of law with respect to the non-core issue of whether Appellees' actions in acquiring the real property violated the Washington Consumer Protection Act.

This appeal was heard with oral argument on June 29, 1995. Debtor-Appellant was represented by Richard Sola; Appellees were represented by Richard Mathisen. Having reviewed the record, heard from counsel, and being fully advised in this matter, the court orders as follows.

## I. FACTUAL BACKGROUND

In the 1980s, Donald Anderson, a truck driver, inherited from his father the real property at issue. The property consisted of four lots with a residence located upon two of lots. In approximately 1983, the property became the home of Mr. and Mrs. Anderson and their family.

In January of 1991, the Andersons borrowed $19,500.00 from CLS Mortgage, Inc., in exchange for which they granted CLS a first deed of trust to the property. The mortgage was payable at a monthly rate of $351.36; however, in March of 1991 the Andersons fell into default and were issued a notice of foreclosure advising them that the default could be cured up to June 29, 1992 by the payment of $2,810.88. Otherwise, the property was noted for a non-judicial foreclosure sale to occur on July 10, 1992. At the time the Andersons received this notice, both the debtor and her husband were unemployed and thus had no firm prospect of curing the default within the prescribed time.

On April 16, 1992, Lindgren sent Mr. Anderson a letter asking him to call if Lindgren could help "with buying, selling, lending on your home." Attached to the handwritten letter was Lindgren's business card indicating his affiliation

with the corporation Homestead USA of Spokane. Homestead USA of Spokane is one of two corporations connected with Lindgren. The First, Homestead USA, Limited, was incorporated at Lindgren's direction in November of 1991. Because Lindgren was incarcerated on a felony conviction, he accomplished the incorporation with the assistance of a prior acquaintance, Defendant Lily Todd. On March 26, 1992, Ms. Todd also filed Articles of Incorporation for the second corporation, Homestead USA of Spokane. At the time of the filing, Ms. Todd was a licensed real estate agent working for the firm of Gregg Jones and Associates. Shortly after March 26, 1992, however, Ms. Todd acquired her own brokerage license and transferred her real estate activities to Homestead USA of Spokane. Lindgren is also an experienced real estate salesman and entrepreneur with over 20 years experience in the real estate business. He has previously been licensed by both the states of Washington and Montana as a real estate agent; however, during the time in question, Lindgren was not licensed to engage in the sale of real estate.

Shortly after receiving Lindgren's letter, Mrs. Anderson contacted him and Ms. Todd. At the time of the meeting, Ms. Todd presented Mrs. Anderson with the business card of Gregg Jones and Associates, Real Estate Professionals. Mrs. Anderson explained her situation to Lindgren and Ms. Todd. Lindgren informed her that, in light of the situation, she had three basic options, which were to sell, refinance, or lose the property. Mrs. Anderson informed Lindgren and Ms. Todd that she did not want to sell the property, and would prefer that they help her find some way to cure the default.

Lindgren and Ms. Todd then examined the property and gathered the necessary information. Lindgren drafted a commitment letter dated April 30, 1992. The document is entitled "Structure" and initially states that Homestead will cure the default and prevent the pending foreclosure by paying

various listed expenses. In addition, the document provides that Homestead will rent the property to the "seller" for a monthly sum of $420.00. The document further provides that the Andersons will be paid $2,500.00 upon vacation of the property, unless they are for any reason evicted.

The document does not provide that the Andersons would deed or convey the property to Homestead, nor does it provide that the Andersons would lose their equity upon transfer of the property. Nevertheless, as Judge Klobucher found, anyone who read the document would come to the conclusion that it transferred the property.

On June 22, 1992, Lindgren accompanied Mrs. Anderson to the office of his attorney, R. Maurice Cooper. Mr. Cooper was not present; however, he had prepared the necessary documents and left them with his paralegal. The documents were comprised of a quit claim deed, whereby the Andersons conveyed title to the property to Homestead, and a rental agreement, whereby Homestead agreed to rent the property back to the Andersons for an indefinite period of time on a month to month basis. At the time of the transaction, the property was valued at approximately $62,000, and was encumbered by an approximately $16,000 mortgage. The Andersons received no money for the conveyance. The deed to Homestead and Homestead's subsequent deed back to Lindgren were recorded.

In January of 1993, Lindgren borrowed $30,000 from Equity Mortgage Services, in exchange for which he granted Equity a deed of trust in the Anderson property, exclusive of the two adjoining lots. He used a portion of the loan to pay off the mortgage owing to CLS, Inc. In addition, in April of 1993, he sold the two adjoining lots to a developer for $9,000.

In March of 1993, the Andersons became delinquent in their rental payments, and Homestead commenced eviction proceedings, which precipitated the instant bankruptcy

petition. At the time of the bankruptcy trial before Judge Klobucher, the residence was encumbered by the Equity mortgage in the amount of $29,076.00. Thus, the Equity encumbrance was $10,962.00 in excess of the CLS encumbrance at the time the Andersons' conveyed their home to Homestead.

Based upon these facts, Judge Klobucher concluded that the debtor had met her burden of establishing the elements of a fraudulent transfer under 11 U.S.C. § 548. Judge Klobucher, therefore, avoided the transfer under section 548, and returned the residence to the debtor pursuant to section 550. Moreover, Judge Klobucher found that the property had been devalued by the sum of $19,962.00 and, therefore, the debtor was entitled to judgment against the Defendants. Judge Klobucher further found that the judgment should be offset by the $9,850.75 expended by the Defendants toward taxes and improvements. Accordingly, Judge Klobucher entered judgment against Homestead and Lindgren in the amount of $10,112.00.

Judge Klobucher also concluded that the actions of Lindgren and Homestead violated the Washington Consumer Protection Act. As such, the court determined that an award of attorney's fees, as well as a $10,000 statutory penalty would be appropriate. Because the matter was non-core, however, Judge Klobucher did not enter judgment with respect to the Consumer Protection Act but, rather, submitted his proposed findings of fact and conclusions of law to this court for final determination.

## II. STANDARD OF REVIEW

With respect to core bankruptcy issues, findings of fact by the Bankruptcy Court are reviewed for clear error; conclusions of law are reviewed *de novo*. In re Deer Park, Inc., 136 B.R. 815, 817 (9th Cir. BAP 1992) aff'd 10 F.3d 1478 (9th Cir.

1993); Wien Air Alaska Inc. v. Bachner, 865 F.2d 1106, 1108 (9th Cir. 1989); Fed R. Civ. P. 52; B.R. 8013. In regard to non-core issues, the bankruptcy judge's findings of fact and conclusions of law are reviewed de novo. The district court may accept, reject, or modify the proposed findings of fact or conclusions of law, may receive further evidence, or may recommit the matter to the bankruptcy judge with instructions. B.R. 9033.

## III. DISCUSSION

### A. 11 U.S.C. § 548

Section 548 of the Bankruptcy Code empowers a trustee with the ability to avoid any transfer of a debtor's property interest made within 1 year before the filing date of the petition. The transfer may be avoided by the trustee, however, only if the debtor received less than a reasonably equivalent value in exchange for the transfer, and if the debtor was insolvent on the date the transfer was made, or became insolvent as a result thereof. In addition, where the trustee is seeking to avoid the transfer, that avoidance may be obtained irrespective of the voluntariness or involuntariness of the debtor's transfer. Stated another way, where the trustee is seeking to avoid the transfer, the trustee need not establish that the debtor involuntarily transferred the property.

For reasons undisclosed in the record, however, the trustee here did not seek to avoid the transfer. Thus, in the present case, the action to avoid the transfer was brought by the debtor pursuant to section 522(h), which provides in relevant part:

> (h)the debtor may avoid the transfer of property of the debtor ... to the extent that the debtor could have exempted such property under subsection (g) (1) of this

section ... if -

(1) such transfer is avoidable by the trustee under section ... 548 of this title ... and

(2) the trustee did not attempt to avoid such transfer.

Subsection (g) (1) of section 522 permits a debtor to exempt transferred property if the transfer was not voluntary, and if the debtor did not conceal the property.

Hence, the debtor may seek to avoid the transfer, provided that, in addition to showing (1) that the property was transferred within 1 year before the petition was filed, (2) that the debtor received less than the reasonably equivalent value in exchange for the transfer, and (3) that the debtor was insolvent on the date of the transfer, or was made insolvent as a result of the transfer, the debtor also shows (4) that the transfer was involuntary, and (5) that the debtor did not conceal the property.

In the present case factors 1, 3, and 5 are uncontested. Defendant Lindgren disputes, however, Judge Klobucher's finding (1) that the debtor received less than the reasonably equivalent value for the property, and (2) that the transfer was involuntary.

1. Value of the Property

Defendant Lindgren contends Judge Klobucher erroneously found that the debtor received less than the reasonably equivalent value for the property. Lindgren's contention is without merit.

Judge Klobucher found that Lindgren acquired the property for an initial cash outlay of approximately $4,000 to cure the CLS default. In addition to this payment, the

Defendants paid the overdue property taxes and paid for the necessary sewer connection. These expenses totaled approximately $9,850.75. At the time of the transfer, the property was valued at $62,000 with a $16,000 mortgage encumbrance. Thus, for an initial cash outlay of $9,850.75, Defendant made approximately $36,149.25.

Defendants' own expert testified that the property was worth at least $53,000 at the time of transfer. Thus, even if the court were to accept this lower figure, Lindgren still would have gained approximately $27,149.25 for his initial outlay of $9,850 75. As these figures aptly illustrate, there was no reasonably equivalent exchange between the parties.

2. Voluntary Transfer

The Bankruptcy Code is silent on the definition of "voluntary transfer." For purposes of section 522 (g) (l) (A), however, several bankruptcy courts have held that a voluntary transfer occurs when a debtor, with knowledge of all essential facts, and free from the persuasive influence of another, chooses of her own free will to transfer the property to the creditor. See In re Reaves, 8 B.R. 177, 181 (Bkrtcy D. South Dakota 1981); see also In re Davis, 148 B.R. 165 (Bkrtcy E.D.N.Y. 1992); In re Seidel, 27 B.R. 347 (Bkrtcy E.D. Pennsylvania 1983); In re Echoles, 21 B.R. 280 (Bkrtcy D. Arizona 1982). As the Reaves court explained, a voluntary transfer does not occur where a creditor has harassed, insulted, and shamed the debtor into transferring the property.

In Reeves, the debtor, prior to filing a chapter 7 bankruptcy petition, encumbered her property with a third mortgage at the behest of an employee of the Defendant Bank. Reaves, 8 B.R. at 181. The bankruptcy court found that, in obtaining the third mortgage, the employee had applied tremendous pressure to the debtor, and had failed to explain to

the debtor the effect of a clause in the mortgage waiving the debtor's right to claim the homestead exemption against the third mortgage. Id. In addition, the debtor in Reaves testified that if she had understood the effect of the waiver clause she would not have signed the third mortgage. Id.

In considering these facts, the bankruptcy court found that a voluntary transfer could not occur where a creditor had concealed or failed to inform the debtor of essential facts necessary for the debtor to make an intelligent decision on whether to transfer the property to the creditor. This is especially true, the court found, where a debtor can show that she would not have made the transfer had she been informed of all the essential facts. Id. at 182.

In Seidel, the court expanded on the holding in Reaves. In Seidel, the debtor purchased a truck from Jones Truck Sales for $12,500. Seidel, 27 B.R. at 348-49. The purchase price was composed of $4,000 in cash and a check for $8,500 from the defendant bank. Id. Shortly thereafter, the debtor called the bank and informed them that he would be returning the truck, due to his family's desperate financial situation. Id. Approximately 1 month after returning the truck, the debtor filed a chapter 7 bankruptcy petition claiming his $4,000 equity in the truck as an exemption pursuant to section 522 (d) (5). Id.

In considering the voluntariness of the transfer of the truck to the bank, the Seidel court recognized the holding in Reaves and the emphasis that court had placed upon the need for freedom from persuasive influence. The Seidel court, however, disagreed with the Reaves decision to the extent that it placed a greater emphasis upon the freedom from persuasive influence than upon the knowledge of all essential facts. Id. at 351-52. As such, the Seidel court elaborated upon the holding in Reaves and found that a voluntary transfer of property does not occur where a debtor does not have knowledge of all the

essential facts pertaining to the transfer and the debtor would not have made the transfer had he been aware of all the essential facts. The court also considered relevant the creditor's failure to inform the debtor of any essential facts within the creditor's knowledge. Id. at 352.

In the present case, based upon his consideration of both the Reaves and Seidel cases, Judge Klobucher found that a voluntary transfer occurs when a debtor, with knowledge of all the essential facts, and free from the persuasive influence of another, chooses of her own free will to transfer the property. Judge Klobucher further found that under the facts as presented before the court, the transfer at issue was not a voluntary transfer. In explaining his conclusion, Judge Klobucher noted that the debtor was never advised by the Defendants of the availability of bankruptcy proceedings, nor was she advised to seek legal advice. Although Judge Klobucher recognized that the record was devoid of any evidence that either Mr. Lindgren or Ms. Todd had personal knowledge of the availability of chapter 13 proceedings, he also noted that the Defendants had represented themselves to be real property professionals. As such, Judge Klobucher concluded that the debtor's decision to transfer the property was the result of the persuasive, ill advised, and inaccurate guidance of Lindgren and, therefore, was not voluntary as required by the bankruptcy code.

Judge Klobucher's conclusion is supported both by the facts as they appear in the transcript of record, and the facts as found in his letter opinion of August 8, 1994. As that opinion explains, Lindgren sent a letter to the Andersons' home in April of 1992 offering assistance with the "buying, selling, or lending" of their residence. In response to Mrs. Anderson's inquiry, Lindgren and Ms. Todd met with the debtor, and Ms. Todd presented her with the business card of "Gregg Jones and Associates, Real Estate Professionals." At that meeting,

Lindgren informed Mrs. Anderson of his extensive business background and real estate expertise and explained to her that her options were limited and she could, therefore, sell, refinance, or lose the property.

As the instant proceedings illustrate, however, these options were not the only options available to Mrs. Anderson. Rather, bankruptcy relief was available, as was the option of selling one of the vacant adjoining lots to raise the necessary capital, which ironically Lindgren did shortly after acquiring the property. When a person represents himself as having expertise in a particular field, he is obligated to perform as represented even where he does not in fact possess the represented skill and knowledge. See, Cultum v. Heritage House Realtors, 103 Wash. 2d 623, 631, (Wash. 1985) (holding that lay persons acting in the capacity of an attorney must comply with the standard of care of a practicing attorney); Bowers v.Transamerica, 100 Wash. 2d 581, 590 (Wash. 1983) (holding a lay person engaged in the unauthorized practice of law to the standards governing attorneys); see also, Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395 (Wash. 1968) (quoting from the Restatement (Second) of Torts: "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade"). A truly knowledgeable and unbiased professional advising a person in Mrs. Anderson's economic distress would also have advised her of her option to seek relief from foreclosure under the bankruptcy laws. Lindgren did not do so. He inaccurately informed Mrs. Anderson that her only options were to sell, refinance or lose the property. Thus, rather than assist Mrs. Anderson with his expertise as originally represented, Defendant enticed her to surrender her substantial equity in the family home to him under the guise that it was her only

alternative to foreclosure. Moreover, Defendant Lindgren induced Mrs. Anderson to transfer her home to him, even though he was aware that she did not wish to sell the home, and would have preferred any other course of action. Mrs. Anderson believed, however, that the only available course of action was the one offered by Defendant.

Mrs. Anderson, therefore, was not in possession of all the essential facts. She was unaware of the availability of bankruptcy relief, or any option other than those represented to her by Defendant Lindgren. In addition, she was in a distraught state of mind brought about by the pending foreclosure. Hence, Mrs. Anderson's transfer of the property, was not voluntary as required by section 522 of the bankruptcy code.

Judge Klobucher's conclusions of law, therefore, were not in error, nor were his findings of fact clearly erroneous. The decision of Judge Klobucher with respect to the core section 548 issue is **AFFIRMED.**

## B. CONSUMER PROTECTION ACT

In his letter opinion of August 8, 1994, Judge Klobucher found that the actions of the Defendants Bryan Lindgren and Homestead USA, Ltd. with respect to the transfer of the property violated the Washington State Consumer Protection Act. Specifically, Judge Klobucher found that the conduct of the Defendants (1) was unfair and deceptive, (2) was within the sphere of trade or commerce, and (3) impacted upon the public interest, thereby falling within the bounds of the CPA. Based upon that finding, Judge Klobucher assessed Defendants a $10,000 statutory penalty and awarded the debtor reasonable attorney's fees. As previously indicated, however, pursuant to 28 U.S.C. § 157 (c) Judge Klobucher submitted his rulings as proposed findings of fact and

conclusions of law for final determination by this court.

1. Timeliness of Objection

Pursuant to section 157 (c) (1), the district court is to review "de novo those matters to which any party has timely and specifically objected." In accordance with Bankruptcy Rule 9033, a party must file within 10 days after being served with a copy of the proposed findings of fact and conclusions of law any objection the party has to the specific findings and conclusions.

In the present case, Judge Klobucher's letter opinion is dated August 8, 1994. In December, the parties entered into a discussion as to whether the CPA issue was a non-core matter. On January 18, 1995, Defendants Lindgren and Homestead USA filed a motion to withdraw the bankruptcy reference, contending, that the CPA issue was a non-core matter. On January 20, 1995, Judge Klobucher submitted the CPA issue to this court for determination as a non-core matter. On February 17, 1995, Defendants submitted a memorandum in support of their motion, pursuant to this court's briefing schedule, wherein they set forth their objections to Judge Klobucher's proposed findings of fact and conclusions of law.

This court finds that the effective date for determining the timeliness of Defendants' objection is January 20, 1995. This court further finds that Defendants' January 18 motion, combined with their memorandum served as notice of their objections to the bankruptcy court's proposed findings and conclusions and was sufficient for the purposes of 28 U.S.C. § 157.

2. Analysis

To establish a private right of action under the CPA, a plaintiff must demonstrate (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to the plaintiff in his business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wash. 2d 778, 784-85 (Wash. 1986).

Applying each of these standards to the present case, this court must consider whether the Defendants engaged in an unfair or deceptive act. The Consumer Protection Act does not define the meaning of "unfair or deceptive act." Potter v. Wilbur-Ellis Co., 62 Wash. App. 318, 327 (1991). The Washington courts have consistently held, however, that to establish an unfair or deceptive act or practice, a plaintiff need not show that the act in question was intended to deceive. See, Nelson v. Nat'l Fund Raising Consultants, 120 Wash. 2d 382, 392 (Wash. 1992); Schmidt v. Cornerstone Investments, 115 Wash. 2d 148, 168 (Wash. 1990); Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wash 2d 778, 784-85 (Wash. 1986); McRae v. Bolstad, 101 Wash. 2d 161, 165-66 (Wash. 1984); Bowers v. Transamerica Title Ins., 100 Wash. 2d 581, 591-92 (Wash. 1983). Nor does the plaintiff need to show an actual deception. Nelson, 120 Wash. 2d at 392. Rather, the plaintiff need only show that the act had the capacity to deceive a substantial portion of the public. Id.

Defendant Lindgren contends that there is nothing in the record to indicate that he made an affirmative misrepresentation to Mrs. Anderson to induce her into the transaction and, therefore, nothing to indicate that he violated the Washington Consumer Protection Act. Defendant's contention, however, misapprehends the nature of the Plaintiff's burden, for a plaintiff need not show either intent to deceive or actual deception. As stated, the Plaintiff need only

show that the act in question had the capacity to deceive the public. The question before this court, therefore is not whether the Defendants in fact deceived Mrs. Anderson, but rather whether their course of conduct was such that their acts had the capacity to deceive a substantial portion of the public.

As the facts illustrate, Lindgren contacted the Andersons after learning that the house was set for a non-judicial foreclosure sale. He represented to Mrs. Anderson that he and Ms. Todd were real estate professionals who could assist her in her time of financial chaos with the "buying, selling or lending" of her home. He induced her to enter into a contract wherein she surrender substantial equity in the family home to the "professionals giving her advice," for a limited month to month right of possession, subject to the payment of a monthly rental obligation which was in excess of her current mortgage payments. In exchange for the Andersons' substantial equity in the family home, Defendant Lindgren cured an approximate $4,000 default.

At trial, Defendant testified that he learned of the Andersons' financial situation by consulting The County Record. Through this publication Defendant testified that he had learned the names of several similarly situated individuals and had begun a "business" of contacting these individuals through the mail and offering assistance. Ms. Todd also testified that she and Lindgren continue to contact individuals facing foreclosure. Lastly, it is important to note that in 1992, Ms. Todd acquired her brokerage license, thereby enabling her to offer a full complement of real estate services on behalf of Homestead, Inc.

Lindgren is thus situated to act in a manner capable of deceiving a substantial portion of the public. He has the ability to contact persons in severe financial distress and offer them assistance in their time of need. Through the use of the corporation and Ms. Todd he represents himself as a person

with extensive business and real estate expertise. Yet, defendant is licensed in no state to sell real estate, and, in fact, was denied a license by the state of Washington. Despite these limitations, Lindgren offers individuals advice as to the best course of action to take in light of a pending foreclosure. By his own admission, however, he is completely uninformed about the availability of bankruptcy proceedings, or, allegedly, any option other than selling.

Cloaked in a shell of expertise, but with claimed limited actual knowledge, Lindgren is uniquely qualified to deceive the public. Thus, while Lindgren may have made no actual express misrepresentation to Mrs. Anderson, his conduct was likely to deceive and therefore Mrs. Anderson has met her first burden.

Second, a private plaintiff must establish that the act or practice complained of occurred in the course of trade or commerce. Id. As the Hangman court recognized, the legislature has broadly defined the terms "trade" and "commerce" to include the sale of assets or services and any commerce directly or indirect affecting the people of the state of Washington. Defendant Lindgren concedes that the alleged conduct occurred in trade or commerce; therefore, the second factor of the CPA test is met.

Whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed. Where the transaction involves an essentially private dispute, the factors to be considered in evaluating a public interest are: (1) were the alleged acts committed in the course of The defendant's business; (2) did the defendant advertise to the public in general; (3) did the defendant actively solicit this particular plaintiff, indicating potential solicitation of others; and (4) did the plaintiff and defendant occupy unequal bargaining positions. Id. at 791. These _

factors represent indicia of public interest from which a trier of fact could reasonably find a public interest impact, thus, they need not all be present, nor is any one factor dispositive. Id.

The facts in this case establish that Defendant Lindgren subscribed to the publication The County Record. Through this publication he learned the names of individuals facing foreclosure proceedings. He then sent these individuals letters on Homestead USA stationary stating that he could assist them in the "buying, selling, or lending" of their home. In addition, the testimony of Ms. Todd indicates that the Homestead corporation still continues in this practice. Considering these facts, it appears that each of the four factors listed above has been met. Moreover, the Defendant concedes that his actions were committed in the course of his business, and that he solicited other similarly situated persons as part of a general course of conduct. In light of Defendants' frank admissions, and the unequal bargaining positions occupied by the parties in this matter, the court finds that Defendant's conduct impacted the public interest.

Lastly, the court finds that the debtor suffered injury to her property and that this injury was causally connected to the Defendant's actions, thereby meeting the last two prongs of the CPA test.

In sum, the transcript of record overwhelmingly supports Judge Klobucher's conclusion that the Defendants engaged in a course of conduct whereby they contacted people in financial distress and offered to assist them. Instead of assisting the Andersons, however, Defendant Lindgren deprived them of their family home, and evicted them when they were unable to make the monthly rental payment. These acts were unfair and deceptive, in addition to being capable of deceiving the public. They resulted in injury to the Plaintiff and were, therefore, violative of the Washington Consumer Protection Act.

Plaintiff is, therefore, entitled to her reasonable attorney's fees. Plaintiff's counsel shall submit on or before July 10, 1995, a statement of attorney's fees. This statement shall segregate the time spent briefing core issues from the time spent briefing the non-core issue. The court finds, however that the time spent during the trial of these matters is interrelated and, therefore, cannot be segregated. Defendants shall have 5 days after service to object to the proposed attorney's fees.

The court is undecided as to the appropriate statutory penalty. Defendants may submit affidavits as to their ability to pay any penalty on or before July 10, 1995. Plaintiff shall have 5 days after service to respond.

**IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish copies to counsel.

**DATED** this 8th day of July 1995.

/s/ JUSTIN L. QUACKENBUSH

JUSTIN L. QUACKENBUSH
Senior United States District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE:
RICKY DALE ANDERSON, Debtor,

RICKY DALE ANDERSON, Plaintiff-Appellee,

vs.

HOMESTEAD USA LTD., HOMESTEAD USA OF SPOKANE INC., LILY M. TODD, BRYAN L. LINDGREN, and DONALD G. ANDERSON, Defendants-Appellants.

NO. CS-95-018-JLQ
CS-95-083-JLQ

Filed January 25, 1996

ORDER RE: PUNITIVE DAMAGES AND ATTORNEY FEES

BEFORE THE COURT in the above-entitled matter are the unresolved matters of punitive damages and an award of a reasonable attorney's fee under the Washington State Consumer Protection Act, RCW 19.86.090. Having reviewed the record, and being fully advised in this matter, IT IS HEREBY ORDERED that Plaintiff is entitled to recover $5,000.00 in punitive damages and $23,821.88 as a reasonable attorney's fee for the following reasons.

The Plaintiff in this case, Ricky Dale Anderson, a chapter 7 bankruptcy debtor, brought this action in bankruptcy to avoid the alleged fraudulent transfer of real property for which she intended to claim a homestead exemption. The Spokane Legal Services Center represented Plaintiff. Bankruptcy Judge John M. Klobucher found that the Plaintiff was entitled to avoid the transfer under bankruptcy law and recover her residence from the Defendants. Judge Klobucher also found that the fair market value of the residence was at least $53,000.00, that the residence had been devalued by the sum of $19,962.00, and entered a Judgment against Defendants Homestead USA, Ltd. and Bryan Lee Lindgren in the amount of $10,112.00 ($19,962.00 less $9,850.00 offset for funds expended by the Defendants toward taxes and improvements). Additionally, the judge found the evidence insufficient to support imposition of liability against either of the Defendants Homestead, USA of Spokane or Ms. Lily Todd.

Judge Klobucher also found that Defendants Homestead U.S.A., Ltd. and Bryan Lee Lindgren had violated the Washington State Consumer Protection Act, and that therefore, Plaintiff was entitled to be awarded $10,000.00 punitive damages as well as an award of reasonable attorney's fees. Counsel for Plaintiff subsequently submitted time and expense statements; Defendants objected to the requested attorney fees; and on December 8, 1994, Judge Klobucher held a hearing on the issue. The judge noted that the requested attorney fees appeared to be disproportionate to the amount of monetary award in this case, but found that because the case involved the Plaintiff's principal residence, the disparity was overshadowed. He also found that the use of two trial attorneys was reasonable. However, he directed Plaintiff's counsel to cut the fee request to a maximum 8 hours per attorney per day, but otherwise approved the requested fees.

Defendants subsequently moved in this court to recall reference of the Consumer Protection Act claim from the bankruptcy court. Judge Klobucher agreed that the Consumer Protection Act claim was a non-core matter, and submitted a Letter Opinion to this court, asking the court to consider, as only advisory, his Findings of Fact and Conclusions of Law concerning the Consumer Protection Act violation.

This court reviewed Plaintiff's Consumer Protection Act claim de novo, and on July 10, 1995 entered an Order Re: Bankruptcy Appeal (Ct. Rec. 26). Like the bankruptcy court, this court found that Defendants Bryan L. Lindgren and Homestead U.S.A., Ltd. had violated the Washington State Consumer Protection Act. Therefore, the court recognized that Plaintiff is entitled to receive a statutory penalty under RCW 19.86.090, as well as a reasonable attorney's fee from the Defendants, but reserved ruling as to the appropriate amounts.

The court directed Plaintiff's counsel to submit a new statement of attorney fees, segregating the time spent briefing bankruptcy core issues from the time spent briefing the Consumer Protection Act claim, but found that the time spent during the trial of these matters was so interrelated that the trial time could not be segregated. As to punitive damages available under the Consumer Protection Act, the court directed Defendants to submit an affidavit as to their ability to pay any penalty.

## DISCUSSION

RCW 19.86.090 provides that a person who is injured in his business or property by a violation of the Consumer Protection Act is entitled to recover actual damages sustained, costs of the lawsuit including a reasonable attorney's fee, "and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages

sustained: Provided, That such increased damage award for violation of RCW 18.86.020 may not exceed ten thousand dollars."

**1. Attorney Fees**

The starting point for determining a reasonable attorney's fee is the "lodestar" figure, which is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. City of Burlington v. Dague, 505 U.S. 557, (1992); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

Plaintiffs have submitted the following request far attorney fees

| Attorney | Hours | Rate | Total |
|---|---|---|---|
| Norm McNulty | 26.5 | $ 125.00 | $ 3,312.50 |
| Catherine Kanter | 246.1 | 90.00 | 22,149.00 |
| Jim O'Connor | 93.35 | 125.00 | 11,668.75 |
| Richard Sola | 15.8 | 125.00 | 1,975.00 |
| John Kennedy | 39.5 | 100.00 | 3,950.00 |
| TOTAL: | 421.25 | | $43,055.25 |

Although there is a strong presumption that the lodestar represents a reasonable fee, the Supreme Court in Hensely, supra. 461 U.S. 424, noted that district courts should exclude from this initial fee calculation hours that were not reasonably expended. Cases may be over staffed, and the skill and

experience of lawyers vary widely. "Counsel for the prevailing party should exclude ... hours that are excessive, redundant, or otherwise unnecessary ..." Gages v. Deukmejian, 987 F. 2d 1392, 1397 (9th Cir. 1992).

Those who cannot afford counsel in a civil case should have the opportunity to be represented, either through pro bono efforts of the local bar association or though an organization such as Spokane Legal Services. However, this does not entitle the Legal Services Center to utilize whatever time is available, in pursuit of a case where the matter could have been adequately, maybe not perfectly, but very adequately, presented without incurring nearly that much time or expense.

The court finds that the hourly rates submitted by counsel represent reasonable rates in this community. However, the court also finds that the number of hours claimed is excessive. Spokane Legal Services has submitted time sheets for over four hundred hours by five different attorneys, including the time spent on six trial days involving two attorneys, for a total request of over $43,000 in a relatively simple case involving a $53,000 home and a judgment of approximately $10,000, that in the judgment of this court, could have been adequately presented by one attorney in approximately 1 ½ trial days. This court cannot agree with the bankruptcy court that having two attorneys at a 6-day trial of this matter was reasonable.

The court notes that the submitted time sheets include duplicative hours, i e., time claimed for more than one attorney on a number of dates. This was not a complex case requiring more than one attorney to litigate. There is nothing about the case that would require the services of more than one attorney, pre-trial, during trial, or post-trial, Therefore, the court finds it reasonable to award reasonable attorney fees for only one attorney for a maximum of eight hours on any given date. Accordingly, the court finds the following hours, which

are in excess of 8 hours a day, to be unreasonable:

| | |
|---|---|
| 6.85 hours | April 11, 1994 |
| 2.00 hours | April 20, 1994 |
| 1.25 hours | April 22, 1994 |
| 8.00 hours | April 23, 1994 |
| 8.00 hours | April 24, 1994 |
| 7.25 hours | April 25, 1994 |
| 8.00 hours | April 26, 1994 |
| 8.00 hours | April 27, 1994 |
| 8.00 hours | April 28, 1994 |
| 8.00 hours | April 29, 1994 |
| 8.00 hours | May 2, 1994 |
| 8.00 hours | May 3, 1994 |
| 6.75 hours | May 10, 1994 |

This represents 88.10 excess hours claimed, elimination of which reduces the total hours to 333.15. Giving counsel the benefit of the doubt, and assuming that the attorney with the most experience, and highest billing rate of $125.00 an hour is appropriate, this results in an adjusted total lodestar of $41,643.75.

Additionally, if, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. Gaglidari v. Denny's Restaurants, Inc., 117 Wn. 2d 426, 450, 815 P2d 1362 (1991). Unless, the court finds the claims to be so related that no reasonable segregation of claims can be made,

> the court must separate the time spent on those theories essential to the [cause of action for which attorneys' fees are properly awarded] and the time spent on legal theories relating to the other cause of action. ...

Travis v. Washington Horse Breeders Assn'n, Inc., 111 Wn. 2d 396, 411, 759 P.2d 418 (1988). Here, it is clear that of the several claims brought by the Plaintiff, a recovery of attorney's fees is only provided for in the non-core Washington Consumer Protection Act. The court has previously found that the time spent during the actual trial in bankruptcy court was so interrelated between core and non-core matters, that it cannot be segregated. However, the court also found that the time spent briefing core issues can be segregated from the time spent briefing the non-core issue, and directed counsel to do so.

The affidavit of Richard Sola states that he has gone through the summaries and excluded time which was expended on the bankruptcy claims, as opposed to work done on the Consumer Protection Act claim. However, the request for attorney fees reflects no itemization showing any attempt to segregate the two, and the total request represents only an insignificant reduction from the original attorney fees request.

The record reflects that the original purpose of Spokane Legal Services Center's representation of the Plaintiff was to seek to prevent her eviction from her residence. The primary purpose of this litigation was to avoid the fraudulent transfer of Plaintiff's residence to the Defendants, a bankruptcy core proceeding. The legal action to avoid the fraudulent transfer of Plaintiff's residence consumed six days of court time in the bankruptcy court, which also included presentation of Plaintiff's Consumer Protection Act claim.

The 6-day trial also included time spent on claims against Defendants Homestead U.S.A. Spokane, and Lily Todd that did not prove to be meritorious. When a plaintiff has pursued unsuccessful claims that are unrelated to a successful claim, the court is to exclude from the calculation of a reasonable fee all hours spent litigating the unsuccessful claims. Schwartz v. Secretary, HHS, ___F. 3d ___, slip op. No. 94-35974 (9th

Cir. filed December 22, 1995). Counsel have made no attempt to identify which of the claimed hours were spent on the unsuccessful claims.

This court finds that preparation and presentation of the Consumer Protection Act claim required no more than one-half of the total hours expended by counsel, outside of actual trial time. At least 50% of the time necessarily was spent on bankruptcy issues, including claims against Defendants that were ultimately dismissed. Therefore, the court is satisfied that of the $41,643.75, $6,000.00 (48 hours x $125.00 an hour) represents the interrelated time spent during the bankruptcy trial. However, the court is satisfied that the researching and briefing of bankruptcy core issues required 50% of the remaining $35,643.75 or $17,821.87 in requested fees. Thus Plaintiff is entitled to $17,821.88 fees for time spent briefing and establishing the elements of a Consumer Protection Act claim plus $6,000.00 for time that cannot be segregated for a total reasonable lodestar of $23,821.88.

In addition to billing judgment reductions, in rare cases, a district court may make upward or downward adjustments to the presumptively reasonable lodestar on the basis of the factors set forth in Kerr v. Screen Extra Guild, Inc., 526 F. 2d 67-69-70 (9th Cir. 1975, cert. denied, 425 U.S. 951 (1975), that have not been subsumed in the lodestar calculation. These factors include (1) the time and labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by an attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by a client or the circumstances; (8) the amount in question and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship

with the client; and (12) awards in similar cases. Id. At 70.

Here, the value of the recovery was approximately $53,000. A 1/3 contingency fee in a case such as this is normally considered reasonable in this community. Had Spokane Legal Services represented Plaintiff on a 1/3 contingency based on the value of the subject property, it would have been entitled to approximately $17,666.00. However, the case involved more than $53,000 because it involved the fraudulent transfer of Plaintiff's home, a value that cannot be accurately ascertained.

Although "results obtained" is one factor that might lead the court to adjust a presumptively reasonable lodestar calculation, the Supreme Court has held that the "results obtained" generally will be subsumed within other factors used to calculate a reasonable fee. Blum v. Stenson, 465 U.S. 886, 900 (1984).

The court has considered a number of the Kerr factors, in addition to the results obtained, in reaching a reasonable lodestar, including (1) the reasonable time and labor required in this case, (2) the fact that this was not a novel or particularly difficult case, (3) that the case did not require extraordinary skill (4) the customary fee in a case such as this, and (5) that any fee was contingent on success. Based on these considerations, the court finds that an adjusted lodestar amount of $23,828.12 is reasonable, that no other Kerr factors are applicable, and that no additional reduction of the lodestar amount under Kerr is appropriate.

**2. Punitive Damages**

The Washington Consumer Protection Act provides that a successful Plaintiff may be awarded three times her actual damages up to a maximum increase of $10,000. The bankruptcy court found that Ms. Anderson was entitled to the

maximum $10,000 punitive damage award. However, the court provided no analysis or reasoning for the amount of the penalty. This court directed Defendants to submit a financial affidavit to assist in determining the Defendants' ability to pay any penalty. The submitted affidavit reflects a quite limited ability to pay a penalty. Thus, the court's initial impression was that $1,500.00 penalty might be appropriate. However, Plaintiff challenged the veracity of the affidavit, and the court authorized Plaintiff to take additional depositions of the Defendants concerning their financial situation.

At the ensuing deposition of Defendant Lindgren, he was evasive and completely uncooperative. Likewise, the scheduled deposition of Homestead U.S.A., Ltd. was aborted due to Lindgren's evasive, uncooperative tactics. This uncooperative attitude could result in the court completely disregarding Defendants' financial affidavit and imposing the maximum penalty, as did the bankruptcy court.

However, the court is satisfied that Mr. Lindgren's resources are quite limited. Nevertheless, the record reflects that Defendant Lindgren has the clearly demonstrated ability to generate considerable funds illegally at the expense of innocent victims. Therefore, this court finds that in addition to the $23,821.88 reasonable attorney's fee, $5000.00 is the appropriate penalty pursuant to RCW 19.86.090 in this case, as punishment for the Defendant and to deter him from conducting similar acts in the future.

**IT IS SO ORDERED**. The Clerk is directed to enter this Order and forward copies to counsel.

**DATED** this 23rd day of January, 1996.

/s/ JUSTIN L. QUACKENBUSH
JUSTIN L. QUACKENBUSH
Senior U.S. District Judge

**APPENDIX D**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICKY DALE ANDERSON, whose husband is Donald G. Anderson aka Ricky Dale Bumsted, Debtor

RICKY DALE ANDERSON, Plaintiff-Appellee,

v.

HOMESTEAD USA LTD.; HOMESTEAD USA OF SPOKANE, INC. ; LILY N TODD; DONALD G. ANDERSON; Defendants,

JACK R. REEVES, Trustee,

and

BRYAN LEE LINDGREN, Defendant-Appellant

Nos. 95-35829, 95-35832, 96-35208

D.C. Nos. CV- 95-00018-JLQ
CV- 95-00083-JLQ

Filed May 27, 1997

MEMORANDUM *

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, Senior Judge, Presiding

Argued and Submitted May 7, 1997
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Before: LAY, ** BEEZER and TROTT, Circuit Judges.

Bryan Lee Lindgren appeals pro se several rulings of the district court. Lindgren's appeals were consolidated, and we affirm.

In April 1992, Lindgren consulted a publication called The County Record and discovered that Ricky Dale Anderson's property was in foreclosure. Lindgren then sent Anderson a letter asking her to call him if she wanted his help with buying, selling or lending on her home. Lindgren testified that as part of his real estate business he would solicit people in Anderson's situation and "lay out the options to the people and allow them to select the best for them." Anderson apparently believed that Lindgren could help her save her family home. She responded to Lindgren's letter by going to his business, which he operated out of defendant Lily Todd's home. *1 Anderson testified that she felt "in a bind," and that she did not have the money to cure her default or to pay for an attorney to represent her at the time. The parties met briefly, and Lindgren admits that Anderson was "adamant that she did not want to sell the property."

** The Honorable Donald P Lay, Circuit Judge for the Eighth Circuit, sitting by designation.

*1 The bankruptcy court found insufficient evidence to impose liability on Lily Todd, and this ruling is not appealed.

Eventually, Lindgren's attorney drafted an agreement that the parties signed on June 22, 1992. Under the agreement, Anderson's property was transferred to Homestead U S A, Ltd. (Homestead), Lindgren's corporation, in exchange for assumption of the existing loan on the property. The default amount on Anderson's loan was $4,684.32, and the balance on the loan was approximately $19,200. The bankruptcy judge found that Anderson's property was worth approximately $62,000. Therefore, Anderson's equity in the property at the time of the transfer was approximately $43,000. In exchange for transferring ownership and equity in the property, Anderson received no money. Anderson testified that she believed she received what amounts to an indefinite lease on the property. However, because the lease was not acknowledged, under Washington law it was a month-month tenancy under which Anderson was required to pay $420 per month in rent, approximately $70 more per month than the mortgage payments that were in arrears. On September 24, 1992, Anderson again signed the quitclaim deed transferring the property. In March 1993, Homestead began eviction proceedings against Anderson.

On April 15, 1993, Anderson filed a Chapter 7 bankruptcy petition. Anderson then filed an adversary proceeding against the defendants to avoid the transfer of the property as a fraudulent transfer and for damages under the Washington Consumer Protection Act (WCPA) and other theories. On the core issue, the bankruptcy court held that Anderson had established a fraudulent transfer under 11 U.S.C. S 548, that

the transfer of the property was not a "voluntary transfer" within the meaning of 11 U.S.C. S 522 (g) (1) (A), that Anderson should recover the property from Homestead, and that both Lindgren and Homestead should be held liable for the devaluation to the property.

The district court affirmed the bankruptcy court's holding that the transfer of Anderson's property was an involuntary fraudulent transfer. The district court adopted the recommendation of the bankruptcy court on the non-core issue and held that Lindgren and Homestead violated the WCPA. Lindgren then filed motions to reconsider and for the district court to seal files containing his criminal records. The district court rejected these motions. The district court held that Anderson was entitled to $23,931.88 in attorneys' fees and $5,000 in punitive damages from Lindgren and Homestead.

Lindgren argues that the bankruptcy court erred in voiding the transfer because it was a voluntary transfer. However, we find no error in the bankruptcy court's conclusions of law nor clear error in its findings of fact. We affirm the avoidance of the transfer.

Lindgren contends that the district court erred in holding that his actions constituted an unfair or deceptive practice violative of the WCPA. Upon review of the briefs and the record in this case, we hold that the evidence supported the district court's findings and therefore affirm the conclusion that Lindgren violated the WCPA.

Lindgren submits that the district court erred in denying his request to seal files containing his criminal records. As part of Lindgren's inquiry to the Washington Department of Licensing regarding the possibility of reinstatement of his real estate license, Lindgren authorized the release of his criminal records. The district court held that once Lindgren authorized the Washington Department of Licensing to obtain his criminal records in order to create an investigative file the

information became public documents subject to disclosure under the Washington State Public Disclosure Act. We find no error of law or fact in the district court's analysis.

Lindgren argues that the district court erred in awarding Anderson attorneys' fees and punitive damages under the WCPA. Upon review of the record and the briefs, we find no abuse of discretion in the district court's determination of the awards.

Lindgren submits that the district court erred in refusing to consider his objections to the bill of costs entered in the bankruptcy court. Because Lindgren failed to object in the bankruptcy court to the taxing of costs, and failed to follow the bankruptcy court rules for appealing taxation of costs, we affirm.

Finally, Lindgren argues that the district court judge was prejudiced in favor of Anderson because of a conflict of interest and should have recused himself. We find no basis to require the district judge to have recused himself.

Anderson's request for attorneys' fees for this appeal is denied.

AFFIRMED.

## APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICKY DALE ANDERSON, whose husband is Donald G. Anderson aka Ricky Dale Bumstead, Debtor,

RICKY DALE ANDERSON, Plaintiff-Appellee,

v.

HOMESTEAD USA LTD.; HOMESTEAD USA OF SPOKANE, INC.; LILLY M. TODD; DONALD G. ANDERSON, Defendants,

JACK R REEVES, Trustee,

and

BRYAN LEE LINDGREN, Defendant-Appellant.

Nos. 95-35829, 95-35832, 96-35208

D.C. Nos. CV-95-00018-JQL
CV-95-00083-JQL

ORDER

Filed July 23, 1997

Before:LAY,* BEEZER and TROTT, Circuit Judges

* The Honorable Donald P. Lay, Circuit Judge for the Eighth Circuit, sitting by designation

The panel has voted to deny the appellant's petition for rehearing. Judge Trott voted to deny the petition for rehearing en banc and Judges Lay and Beezer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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# APPENDIX F

## BANKRUPTCY CODE

### 11 U.S.C. section 522

(g) Not withstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c) (2), 542, 543, $50, 551 or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section it such property had not been transferred, if

1 (A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property;

## WASHINGTON STATE - RCW

**19.86.010. Definitions**

As used in this chapter:

(1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

(3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate and any other thing of value.

**19.86.020. Unfair competition, practices, declared unlawful**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

**19.86.910. Short title**

This act shall be known and designated as the "Consumer Protection Act."

**19.86.920. Purpose--interpretation--Liberal Construction Saving--1985 c 401; 1983 c 288: 1983 c 3; 1961 c 216**

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade unfair, competition and unfair deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed

that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.